Exhibit A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
W.R. Grace & Co., et al.,	.	
Debtor(s).	.	Bankruptcy #01-01139 (JKF)

Wilmington, DE
November 14, 2005
11:30 a.m.

TRANSCRIPT OF OMNIBUS HEARING
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY JUDGE

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE COURT: Good morning. Please be seated. Everything working now? Everything is working? Okay. This is the matter of W.R. Grace, 01-1139. The call-in list I have --

(Telephone interruption)

UNIDENTIFIED SPEAKER: Good morning.

THE COURT: Good morning. Would you all please put your mute buttons on. It sounds like somebody's typing or something in the background. And I will read your names -- the list of names I have for the record. David Siegel, Paul Norris, Elizabeth DeCristofaro, Edward Westbrook, Curtis Plaza, Darrell Scott, Matthew Kramer, Robert Horkovich, Tiffany Cobb, Jay Hughes, Christopher Candon, Mark Bartholomew, Sarah Edwards, Michael Davis, Marti Murray, Michael Infalco, Scott Beechert, Gerald George, John O'Connell, Steven Mandelsberg, Mary Martin, Van Hooker, David Parsons, David Bernick, Lori Sinanyan, Cara Santosuoss, S-A-N-T-O-S-U-O-S-S, Jennifer Scoliard, Andrew Craig, Roger Frankel, Monique Almy, Jonathan Brownstein, Joseph Radecki. Good morning.

MS. BAER: Good morning, Your Honor, Janet Baer on behalf of the Debtors. Your Honor, agenda item #1 is the Debtor's Motion to Approve the Settlement with Intercat. The parties are still negotiating that document and we ask that that matter be continued to the December 19th hearing.

THE COURT: All right.

MS. BAER: Your Honor, agenda item #2 is the Debtors'

Application for the Authority to retain Bear Stearns.

THE COURT: May I interrupt you second?

MS. BAER: Sure.

THE COURT: The parties on the phone, please put your mute buttons on. I can still hear somebody. I'm sorry, Ms. Baer, go ahead.

MS. BAER: No problem. Your Honor, the Debtor is asking to retain Bear Stearns as a financial advisor for one specific transaction and one transaction only. They are a potential bidder in purchasing a specialty chemicals business. The business itself, Your Honor, would be a $60 million purchase and that would come to Your Honor on a separate motion. All the Debtor is asking for today is to ask to retain Bear Stearns to assist them in that transaction. The Debtors would like to use Bear Stearns because Bear Stearns knows the seller. They've had a relationship with the seller and know the seller's business and that respect can be, and have in fact, been very helpful in assisting the Debtors in this transaction.

Again, we're not attempting to retain Bear Stearns for any other transaction other than this transaction. We do not believe Bear Stearns is a professional, Your Honor. We believe that under 363 you clearly could authorize the Debtor to expend the funds to retain Bear Stearns to assist in this transaction. In fact, Your Honor, we believe that it may not even be an out

of the ordinary course transaction, it may be something the Debtors could just do. But we came here because we wanted everybody to know what we were doing. We came here, frankly, for a comfort order so that we knew that Bear Stearns could move forward, assist the Debtor and get paid for assisting the Debtor.

Under these circumstances, Your Honor, we do not believe the U.S. Trustee's motion really is an impediment. The U.S. Trustee filed a motion -- or, I'm sorry, a response indicating that if we are seeking to retain Bear Stearns as a professional under Section 327, they are not disinterested and can not be retained. The U.S. Trustee is taking the position that Bear Stearns has an actual conflict. The Bear Stearns trading desk, Your Honor, owns some unsecured debt and some equity in the company. They have established ethical walls which the Debtors and Bear Stearns believed were adequate and under case law could in fact permit this Court in its discretion to retain them as a 327 professional. However, Your Honor, we really don't need to get there. Bear Stearns is not a professional under the First Merchants Acceptance Corporation Test.

THE COURT: Well, then do you want to withdrawal the motion?

MS. BAER: What we'd like to do, Your Honor, is ask for the authority under Section 363 to retain Bear Stearns, rather than under 327, and ask Your Honor for permission to go

forward and obtain a comfort order under Section 363 retaining Bear Stearns.

THE COURT: But even under 363, that would be because you're essentially using Bear Stearns as, not necessarily a broker, but an agent --

MS. BAER: As a --

THE COURT: -- to negotiate the transaction?

MS. BAER: They're actually a -- they are an investment banking firm. It's essentially like an agent and they are assisting by reviewing the due diligence with the Debtors and assisting in understanding the business.

THE COURT: Okay. Number one, this motion was not filed in time to get on to this agenda, so I -- and I have no Motion to Shorten, and I believe my staff contacted somebody to advise about that. Number two, to the extent that it's a -- probably something that needs to be addressed, I would have granted the Motion to Shorten, so I will permit it to go forward, but nonetheless, that's what my staff tells me. So please, I want to get things back to the point where they are filed on schedule to be heard for hearings.

MS. BAER: Your Honor, I believe local counsel can address this because it was submitted on time.

THE COURT: That's -- it's okay.

MR. O'NEILL: It was filed timely, Your Honor, and we did talk with your Chambers about the timely filing. So --

THE COURT: It was filed on time?

MR. O'NEILL: It was filed timely. On the preliminary agenda the date of the filing was wrong. It was fixed for the final agenda.

THE COURT: All right.

MR. O'NEILL: But the motion was filed timely.

THE COURT: Okay, thank you.

MS. BAER: Your Honor, we understand and we truly tried to adhere to the letter and the spirit of that order.

THE COURT: I know and frankly, this case doesn't usually have those problems, which is why I didn't interrupt you at the beginning when I thought it was still a problem, but thank you for the correction. Okay, on behalf of the U.S. Trustee?

(Telephone interruption)

THE COURT: People on the phone, please, if you don't put your mute buttons on, I'm going to disconnect the call. Please, I don't want to hear the paper clicks and the typing. Please put your mute buttons on. Good morning.

MR. KLAUDER: Good morning, Your Honor, David Klauder for the United States Trustee's Office. I guess I have to ask Your Honor for some guidance. What's before Your Honor is a 327 Application.

THE COURT: Yes.

MR. KLAUDER: Bear Stearns to be retained as a

professional. I think our argument is quite clear there that they are a Creditor and therefore, under Price Waterhouse, they cannot be retained under 327. It now sounds like -- and I've spoken to the Debtors, we had some discussions about this before, but they're doing a 180 here and saying, "No, they're not a professional. Can we do it under 363?" Our position would be, yes, they are a professional under the First Merchants Test. Now, if Your Honor wants to get through that -- go through that analysis now, I'm happy to do so, but that really is not before Your Honor at this juncture.

THE COURT: Well, I guess they've made an oral motion and the Court can hear oral motions, provided that appropriate Parties-In-Interest are notified. And I could state for the record that this a large Courtroom that is at least b full, and although I didn't take entries of appearance of those of you in the Courtroom, we could do it for purposes of this record, but all, from my visual observation, constituent parties who have been taking an active role in this case are represented by counsel in the Courtroom. So I think we could go forward on that basis if you want to address the 363 issue.

MR. KLAUDER: That's fine, Your Honor, and it comes down to is Bear Stearns a professional, which would be -- which would implicate the First Merchants Test that is widely used in this District. I would say first, Your Honor, it's the U.S. Trustee's position dealing with a professional that -- and I

take this from Bankruptcy Judge Fox's opinion in Metropolitan Hospital, which is at 119 BR 910, that a professional is anyone who assists the Debtor in operating the business in a prudent and competent fashion, i.e. assist the Debtor-in-Possession in its duties under the Bankruptcy Code and that that particular entity needs to be retained.

Getting to the First Merchants Analysis, there are six factors, and going through those, the number one factor is whether the entity controls, manages, administers, invests, purchases or sells assets significant to the Debtor's reorganization. I guess from our perspective, this transaction -- which we don't know much about, we know it's a potential purchase of the asset. It has to be significant to the Debtor's business. Why would the Debtor be entering into the transaction? Then we would argue ultimately that would be significant to the Debtor's reorganization. And Bear Stearns is involved in helping the Debtor consummate the transaction, therefore, it would be our position that they are a professional, when looking at it, under that circumstance; that these are assets significant to the Debtor's reorganization and Bear is intimately involved in helping facilitate that transaction.

The second factor is whether the entity is involved in negotiating the Plan terms. I don't think we can argue that they are, where there's been nothing brought in front of us

that they are gonna be involved in the Plan. But again, I would go back to the first -- the analysis under the first part. These are significant assets and Bear is gonna be intimately involved in consummating that transaction.

The third factor is whether the employment is directly related to the type of work carried out by the Debtor or the routine maintenance of the Debtor's operations. Again, we don't know much about the transaction, but I'm not so sure that we can consider this a routine transaction in the Debtor's business. It's a purchase of a competing business. I'm not so -- the Debtor is not involved in the routine aspects of its business, in purchasing businesses. It obviously has some significance. The Debtor wants to move forward with it, so I would -- we would argue it's not a routine matter. It's not the ordinary operations of the business.

The fourth factor is whether the entity is given discretion or autonomy to exercise their professional judgment. I think clearly Bear is gonna have that here. They are being hired for that reason. Their professional judgment is key here and I think that clearly has been satisfied.

The extent of the -- the fifth factor is the extent of the entities involvement in the administration of the Debtor's estate. No, they are not the estate's financial advisor, I think that's clear. But again, they are providing much needed skill and expertise on a significant transaction to the

Debtor's business and, ultimately, the Debtor's reorganization.

THE COURT: Okay, is the fact that there is apparently an ethical wall set up between the trading desk and whatever arm of Bear Stearns would be assisting the Debtor and looking at both the financial and other business aspects of this transaction and how it would fit with the Debtor's business to engage it a sufficient way around the 363 issue?

MR. KLAUDER: Well, I don't think so. I don't think that gets into the professional analysis, Your Honor. That would be a factor under 327, and we considered that, but under Price Waterhouse, I don't -- that doesn't matter. The entity is a Creditor, the entity is an equity holder. That doesn't matter about ethical walls. They are not disinterested, therefore, they cannot be retained under 327. Under a 363 analysis, I don't -- or under professional -- whether it is a professional analysis, I don't think that factors in at all.

THE COURT: All right, so, the U.S. Trustee's position is if you're a professional, you can't be retained under anything other than 327?

MR. KLAUDER: Correct.

THE COURT: Okay.

MR. KLAUDER: The final factor, Your Honor, the sixth and final factor is when a -- whether the entity services involves some degree of special knowledge or skill such that the entity can be considered a professional within the ordinary

meaning of the term. This is kind of the "if it looks and acts like a professional, it must be a professional." At least that's the way I would put it in front of Your Honor. Bear Stearns certainly puts themself out in the market as a professional. I think under the ordinary meaning of the term, Bear Stearns is a professional, as it were, so I think that that factor has been satisfied as well.

So with all that, Your Honor, I think Bear Stearns -- it's -- I understand it's one transaction, but the -- you kind of have to go through this analysis. It's a significant transaction. You can't get around 327 here. They're trying to get away from it and go a different route, and I don't think the Code or the law provides that. Unfortunately, they are a Creditor, they are an equity holder and they're not allowed to be retained. So you can't just kind of shoehorn it a different way here. And therefore, from our perspective, they cannot be involved in the transaction.

THE COURT: All right.

MR. KLAUDER: Thank you.

THE COURT: Thank you. Yes, sir, good morning.

MR. WEISS: Good morning, Your Honor, John Weiss of Latham & Watkins on behalf of Bear Stearns. I just wanted to point out a few facts that I think are relevant here, and also frankly, to correct the record as well. We have engaged the U.S. Trustee in discussions for some time and very much

appreciate the Trustee's speaking with us about this, and the Trustee was aware of the fact that we were going to talk to Your Honor about 363 today.

I think it's important to point out that the transaction that we're dealing with here is not the sale transaction -- or the -- rather, the purchase transaction. It's not the purchase of the specialty chemical business. What we're dealing with here is a letter of understanding between Bear Stearns and the Debtors that involves a nominal fee, really a de minimis fee in the context of these cases. In fact, the fee was originally listed as $1.25 million. That fee actually would be reduced to $1 million in agreement with the Official Committee of Unsecured Creditors in this case. So this is a $1 million issue, Your Honor, to be considered here.

Bear Stearns has been working with the Debtors with respect to this transaction for some time. And when you look at this I think that you do -- were correct to focus on the First Merchants Factors, and I would actually focus on certain factors that the U.S. Trustee pointed out to reflect the fact that Bear Stearns actually is not a professional under the First Merchants Factors. And really, particularly, the issue here is that when you're looking at this transaction, a $1 million retention agreement, more or less, it's a de minimus transaction and it really is wholly unrelated to what happens ultimately in these cases with respect to a Plan of

Reorganization. This isn't a situation where Bear Stearns is to provide services that are intimately related to the administration of the estates. It's not a situation where Bear Stearns is dealing even with an ultimate transaction that will have any bearing on whether this estate is able to effectively reorganize or not. This is a situation where Bear Stearns is assisting the Debtors and taking advantage of a very good business opportunity. And it's really as simple as that, and that's why we come to Your Honor under 363.

Now, whether Your Honor determines that this is a -- that Bear Stearns is a professional or not a professional, in fact, there actually is authority for Your Honor having discretion under 363 to allow the retention of Bear Stearns, very recent authority out of the Southern District of New York in the Enron case. The District Court actually allowed the retention of a special counsel and essentially makes the statement to the effect that {quote}, "The authorization of certain types of payments under 363(b) is not prohibited simply because there is another section to the Bankruptcy Code related to the same type of payment." And that -- there the Court was talking about 327(e). So there is discretion here for Your Honor to authorize this under 363, and we would ask that Your Honor do so to enable us to go forward.

THE COURT: Well, the special counsel provisions were somewhat different. I don't -- I mean, I -- I'm not familiar

with that aspect of the Enron case. I don't know why the Court would go to 363(b) when you've got 327(e). I mean --

MR. WEISS: Well, there was a question as to the basis for retention because of the nature of the services to be provided, Your Honor.

THE COURT: Well, I -- okay, I don't know how that fits into this analysis because if it's a special counsel issue and you meet 327(e), I don't even think you need to take on the proposition of 363(b). But I -- but Bear Stearns is not being asked to provide legal advice, correct?

MR. WEISS: Correct.

THE COURT: You're being asked to provide financial advice of some sort in terms of, as I understand it, figuring out whether this aspect -- this sale would be a good, I'll use the word fit, for the Debtor's business?

MR. WEISS: Correct, Your Honor. I -- you know, I think that when you look at the transaction at hand here and you apply sort of the vertical and horizontal tests that are controlling in this Circuit with respect to whether this is just purely an ordinary course of business transaction, I think that you come down and you get to where we need to get here, which is that this is an ordinary course of business transaction. I mean, industries of this size or companies of this size and Bear Stearns engage in these types of engagements all the time.

THE COURT: Well, if that's the case, then I don't need to do an order.

MR. WEISS: True, Your Honor, except --

THE COURT: In fact, I probably can't do an order.

MR. WEISS: Except that the United States Trustee has questioned whether, in fact, this is an ordinary course of business transaction. So in light of that questioning, Bear Stearns can't go forward with providing services not knowing the --

THE COURT: Well, look --

MR. WEISS: -- ultimate result.

THE COURT: -- it doesn't seem like an ordinary course of business transaction. I appreciate the fact that businesses do from time to time merge or purchase other businesses and so forth, but Grace is not in the business of purchasing other businesses for some purpose. And so although this may be an expansion or -- I'll use that word in a loose sense -- of Grace's business, I don't know that that makes it in the ordinary course. It's a pretty significant transaction and -- but what would be in the ordinary course is that the Debtor, in connection with carrying out this transaction, does have to do due diligence and hire somebody to assist it in the course of doing that due diligence, and that, I would say, is in the ordinary course of investigating this transaction. So I appreciate the fact that the Debtor needs the assistance. The

issue is whether Bear is conflicted out by virtue of being a stock holder in the Debtor.

MR. WEISS: Well, and I think Your Honor points to the exact distinction that we stress here, which is the distinction between the two -- you know, the two transactions; in other words, the engagement transaction versus the purchase transaction. We would say that Your Honor can authorize Bear Stearns to go forward and can authorize payment to Bear Stearns because it's not -- this wouldn't be a situation where we're dealing with 327 and disinterestedness.

THE COURT: But ultimately, isn't what Bear is being asked to do for the Debtor is give the Debtor the financial information that's going to let the Debtor's Board decide whether or not to enter into this transaction? So, I mean, I don't know how you can say you're not involved ultimately in the transaction. Isn't that the purpose by which you're being asked to give financial information?

MR. WEISS: That is the purchase -- that is the purpose for the types of services that Bear is to provide, but the test that you should be -- the transaction that you should be applying the ordinary course of business test to is the contract at hand. There's no telling whether there will ultimately be a purchase in this instance, Your Honor. Bear Stearns may not get paid at all. It's essentially a question of can Bear Stearns get the comfort to go forward over the

coming months, knowing that they'll be essentially reimbursed for their expenses and paid for their services that -- many of which have already been provided.

THE COURT: Well, the Debtor is not going to be happy with this comment, but I'll ask it anyway. If there is some negotiation that considers Bear to be paid for whatever services that are provided not keyed on the success of this deal going forward, does that eliminate the U.S. Trustee's objection? Is part of the problem in considering Bear to be a professional in this instance that fact that your compensation depends on the outcome of the deal, because you're acting in the nature of, not quite a broker, an agent. I don't know what else -- what other word to use.

MR. WEISS: I'm not sure I understand exactly the question.

THE COURT: You said ultimately you may not get paid.

MR. WEISS: That's true. In other words, it's sort of a completion fee-type situation.

THE COURT: Right, which is what I'm asking, whether that's the problem that the U.S. Trustee has, that your compensation depends on the completion of the deal as opposed to the fact that the Debtor is retaining you to give it some financial advice about the transaction?

MR. WEISS: I wouldn't want to speak for the United States Trustee. That's not a distinction that I've had --

personally had discussions with the United States Trustee that that's the specific item of concern there.

THE COURT: Well, does it eliminate it if the deal is re-done at -- you know, I -- maybe it can be even a less expensive fee. If you know you're going to get paid, there's no contingency aspect to it. Does that eliminate it and make it more ordinary course, where the Debtor is simply hiring somebody to analyze a transaction and give it financial advice?

MR. WEISS: Speaking personally, Your Honor, I don't think --

THE COURT: No?

MR. WEISS: -- that it would change anything because the ordinary course of business with these types of arrangements is, in fact, to get paid upon completion.

THE COURT: Completion?

MR. WEISS: Yes.

THE COURT: Okay.

MR. WEISS: That's been my personal experience, at least, in dealing with these, Your Honor.

THE COURT: All right, thank you. Ms. Baer?

MS. BAER: Your Honor, just a couple final points. The status of the transaction, Your Honor, is that there was an auction proceeding that Bear Stearns assisted the Debtor in in putting together their bid. The bid's been made. It's down to two potential purchasers. A letter of intent is due this week,

and then there'll be some more due diligence. That's all Bear Stearns is being asked to do is look over the letter of intent, assist with the due diligence. In that respect, Your Honor, it is really ordinary course of business for the Debtor to hire consultants to help them with various transactions. It's a dynamic company that buys and sells businesses. It's a dynamic company that does different kinds of transactions all the time, in spite of the fact that we're in Chapter 11. But we came here, Your Honor, because we are, in fact, going to be paying Bear Stearns a million dollars if this transaction is completed. We believe that that is an expenditure of funds that was something we should bring to the attention of the Court. But under 363, Your Honor, you have the authority to let us spend that money outside the ordinary course when, in fact, it makes good business judgment. Here, it does make good business judgment. They will assist us in a potential transaction that can further the Debtor's business. They're not a professional. There's no discretion involved here whatsoever. This potential merger or this potential sale is not key to the Debtor's reorganization. The Debtor's reorganization will go forward whether or not it happens. We hope that it will help to the value of the business and the value of the business helps everybody. But it is truly just a transaction in the Debtor's business versus -- and I mean the retention of Bear Stearns is just a transaction in the Debtor's

business, the kinds of things they do. It's different from the merger.

(Telephone interruption)

THE COURT: People on the phone, say your names.

MR. HORKOVICH: Robert Horkovich.

THE COURT: Don't --

MS. ALMY: Monique Almy.

THE COURT: Folks, please, don't put your mute buttons -- don't -- put your mute buttons on, please, all of you and then say your names.

ALL: (No verbal response).

THE COURT: There is someone who still has not put a mute button on. Are you using Court Call? You're not using Court Call?

MS. BAER: Yes, we're using Court Call.

THE COURT: You are? Okay, can the Court Call operator -- whoever it is --

OPERATOR: I can mute all of their lines. I just don't know when somebody needs to speak, you know -- who to open up lines.

THE COURT: Well, can you detect who it is who's not putting the mute button on because we're still getting feedback here and that --

OPERATOR: I just now did, yes.

THE COURT: Okay, then disconnect that person, please.

OPERATOR: Okay.

THE COURT: Thank you. Okay, Ms. Baer.

MS. BAER: Your Honor, in conclusion, the Debtor is trying to be practical here and move forward. All we're asking for is the authority to pay Bear Stearns a fee if a transaction is ultimately consummated. All we're asking for is the authority to go forward and retain Bear Stearns to assist it in this potential transaction.

THE COURT: But that's -- I mean, that's begging the question, truly. I -- that's why you always hire a professional, to get advice. What you're telling me is it's in the Debtor's best -- ordinary course of business to get advice, and that's probably true, but that doesn't stop the fact that what you're looking for is professional advice.

MS. BAER: Well, Your Honor, again, it's what is a professional under the Bankruptcy Code? A professional are the lawyers in this room who are involved in the bankruptcy in the Chapter 11 case and assisting the Debtors there. That's not what Bear Stearns is doing. We have Blackstone. They're our financial consultant. Bear Stearns is simply a consultant being asked to lend help to the Debtor in one aspect of its business, which is the aspect involved in buying and selling businesses, expanding its business lines and the like. It is not a professional that has, frankly, anything to do with this Chapter 11 case, other than the fact that we happen to be in

Chapter 11.

THE COURT: Yes, I appreciate the problem. I also know then in the Price Waterhouse=s opinion -- although that was different because I think there the Debtor definitely was attempting to use the accountant services for the same purposes that it had used them pre-petition and in -- expected an ongoing relationship. So I agree that the parameter of the retention was different, but it seems to me that you're still looking for professional advice because if you had the capability of doing it in-house, you would do it in-house. You wouldn't be reaching outside for that advice. Nonetheless, having said that, it seems to me that 363 does permit me to let the Debtor expend funds out of the ordinary course of business for limited purposes, and this does appear to be a use of money that the Debtor actually has to incur if it's going to make any sense to go forward with this transaction at all. I guess what I don't know and what I didn't pick up from the papers is why it has to be Bear that has a conflict as a professional and not someone else. You've indicated that there's a relationship with the buyer, but in and of itself, I don't understand the dynamic and why that is a significant issue.

MS. BAER: The reason why Bear, Your Honor, is because Bear knows the buyer. So Bear brings good faith, Bear brings knowledge about the business, Bear brings more legitimacy to the Debtor's bid. Our concern, frankly, Your Honor, is if

Bears drops out now and we complete this transaction on our own or with Blackstone or anything else, that will be a negative impact on the buy -- on the seller. And the seller is now trying to determine which bid to go forward with. And Bear's being present in this transaction is assisting the Debtor in having its bid looked at and taken very seriously by the purchaser -- I'm sorry, by the seller.

THE COURT: Well, okay, that's kind of a cart before the horse analysis too because Bear got involved before this whole transaction went forward, and that's what I see as the problem. You know, it's sort of that you create the problem and therefore -- or create the circumstance that leads to the problem and then say, "Okay, the only solution is to accept the fact that we created a problem because if we try to get out of it, there's going to be an even bigger one." And I'm not sure that's what the purpose of Section 363 is either. Having said that, in this instance, I'm going to permit the Debtor to expend the funds. It appears to me that with no one -- no Party-In-Interest who has an economic stake in this transaction objecting that it is an appropriate use. However, the next time the Debtor expects to do this, come here before you retain someone because I'm not going to approve it again with hindsight, as opposed to foresight.

MS. BAER: Thank you, Your Honor. We will submit an order to the Court on a Certification of Counsel that will

outline the transaction and the fee reduction that was negotiated with the Unsecured Creditors Committee.

THE COURT: All right, thank you.

MS. BAER: Thank you.

MR. PASQUALE: Just on that point, Your Honor, Ken Pasquale from Stroock for the Creditors Committee. The reduction was already mentioned. The other item that was agreed to was that for what's called the adjusted fee in the relationship -- in the transaction, that Bear Stearns will return to the Court for approval of any adjusted fee that might be sought on notice to all parties so that we have a chance --

THE COURT: Other than the million dollars, you mean?

MR. PASQUALE: I'm sorry?

THE COURT: Other than the million dollars --

MR. PASQUALE: Yes, except that --

THE COURT: -- that you're agreeing to?

MR. PASQUALE: That's right, it's an alternative.

THE COURT: Okay, let me --

MR. PASQUALE: Thank you.

THE COURT: Let me assure Bear Stearns that unless some really good deal happens and some -- whatever, probably you're looking at a million dollar fee under these circumstances.

MR. WEISS: Actually, Your Honor, I believe the mechanism is actually designed to deal with, generally, fees

that would be less than a million dollars.

THE COURT: Okay.

MR. WEISS: And we could return to the Court in the event that that negotiation had to occur for a lesser fee amount.

THE COURT: Well, sure, you know, I think those issues, if you're going to agree on lesser fee amounts, probably will come here by stipulation. If you have to -- you know, if you -- if there's a fight, obviously you can always come to Court.

MR. WEISS: Right, thank you --

THE COURT: Okay.

MR. WEISS: -- Your Honor. If I may be excused?

THE COURT: Yes, sir, thank you.

MR. WEISS: Thank you.

MS. BAER: Your Honor, that takes us to agenda item #3, which is the Debtor's Motion to Approve a Stipulation with the Bank of American with respect to their claim. No objections were filed to that, Your Honor. We did have a couple of minor adjustments to the stipulation and submitted it on Certification of Counsel on Friday. The two adjustments which were negotiated with the Unsecured Creditors Committee were, one, just a mathematical adjustment, and #2, an additional paragraph that clarifies that since these Proofs of Claim are contingent, it has to do with letters of credit that

have been posted and if B of A pays a letter of credit, they have an allowed Unsecured Claim. There's a paragraph clarifying that clearly then their contingent claim is reduced by whatever is paid and that becomes, then, a regular liquidated claim. We did submit it under Certification of Counsel, but I have another copy here that I could hand up if Your Honor would be willing to sign it today.

THE COURT: All right, this has been circulated to all the parties and everyone agrees?

MS. BAER: Your Honor, the original stipulation was circulated to all the parties, it was filed as part of the motion, and the only change, Your Honor, is that there were these -- this mathematical calculation and this additional paragraph added Friday at the request of the Unsecureds and that was filed on Friday.

THE COURT: Okay, I'll take your order. I had a question, though. I'm not sure whether this stipulation has some effect on the adversary that's pending between Grace and National Union?

MS. BAER: No, Your Honor, it does not. The National -- it does not in the direct sense. If in fact B of A would pay the letter of credit posted on behalf of National Union, that would then become a liquidated claim that is governed by this stipulation. This simply is allowing whatever claims B of A has in the event that letters of credit are drawn and paid.

THE COURT: Okay, so the summary judgments that are still pending still have to go forward on the National Union adversary related to claims under those various protocols?

MS. BAER: Yes, Your Honor, at this point B of A has not paid those letters of credit and there're still issues as to whether or not any of those letters of credit should be drawn and payments made.

THE COURT: Okay. Okay, thank you.

(Pause in proceedings)

MS. BAER: Your Honor, I apologize, the order is kind of buried in the middle. I don't know if you found it. If not, I can point it out.

THE COURT: I think I found the order. I'm looking at, I think, Exhibit-B had -- is the blackline, is that the one you wanted filed? Okay.

MS. BAER: Yes.

(Pause in proceedings)

THE COURT: All right, that order is entered.

MS. BAER: Thank you, Your Honor. Agenda item #4, you already signed an order on that last week, Your Honor. That takes us to agenda item #5, which relates to the phase one property damage estimations, and I'll turn the microphone over to my colleague, Michelle Browdy.

THE COURT: May I suggest that we go through whatever else is on this agenda before this? I think this is going to

take more time, and to the extent that other parties may choose to leave if they're not involved, I think we should go through other items.

MS. BAER: Your Honor, our concern is -- and the reason we put it on the agenda where it is is because Ms. Browdy is on trial in Spokane, Washington and she needs to catch a flight back to Spokane for trial tomorrow, which is why we put it where we did on the agenda.

THE COURT: What time is your flight?

MS. BROWDY: Your Honor, I have a 5 o'clock flight out of Philadelphia.

THE COURT: All right, so you need to leave by 2?

MS. BROWDY: I thought 3, but 2.

THE COURT: Let's finish the rest of the agenda items. I'll make sure you're -- I have other cases that are set, so --

MS. BROWDY: Thank you, Your Honor.

THE COURT: Okay.

MS. BROWDY: And just for clarification, we did make efforts to try to move this hearing first, but this is the only date that worked out. I apologize for the need to leave.

THE COURT: Okay, all right.

MS. BAER: Your Honor, agenda item #6 is related. That has to do with the 15th Omnibus Objection and I think Ms. Browdy was going to give a status and it's relationship to the

phase one matters. So perhaps it makes sense to then also skip that for now.

THE COURT: All right.

MS. BAER: Agenda item #7 is the Debtor's --

MR. BAENA: I'm sorry, I have to interrupt, counsel. Your Honor, I believe that --

THE COURT: I can't hear you, Mr. Baena, I'm sorry.

MR. BAENA: I'm sorry, may it please the Court, Scott Baena on behalf of the Asbestos Property Damage Claimants Committee. I believe there are a lot of people on the phone, Judge, in respect of item #6. And maybe we could --

THE COURT: Do the status report --

MR. BAENA: -- take #6 and deal with the order so that these people who don't want to listen to the rest of this calendar can move on and we won't have the interruption of the background noise.

MR. LOCKWOOD: Your Honor, I'm the next one up after this (indiscern.) and I'm perfectly willing to wait and accommodate other folks. I'm gonna be here for the Kaiser hearing anyway, so that can go last.

THE COURT: All right, let's start with 6 then, Ms. Browdy, thank you.

MS. BROWDY: Okay, Your Honor, well, while we're dealing generally with the property damage claims, I have two orders to hand up. The first is an order memorializing the

results of the Anderson Memorial Hearing we had on the 31st, and that's gonna lead to the expungement of just under 600 claims. We've gone over the Form of Order with Mr. Speights and the parties are in agreement on it.

THE COURT: All right.

MS. BROWDY: The second order I'm gonna hand up is an order granting certain relief under the 15th Omnibus Objection. Those are basically defaults and certain stipulated withdrawals or recharacterizations.

THE COURT: All right. Thank you.

MS. BROWDY: And to clarify, Your Honor, on the 15th Omnibus Order that we handed up, the exhibits -- essentially the defaults, there are about 100 fewer on the order that we just handed up versus the one that was circulated with the agenda. Sixty claims we discovered were general unsecured claims, so that we're removing those from the property damage buckets, but we aren't seeking to default them.

THE COURT: All right.

MS. BROWDY: They just shouldn't have been there. And then there's about another 30 claims filed by a particular law firm who has asked for a 30-day extension, and we've granted that. So those claims should not be defaulted at this time.

THE COURT: Okay, with respect to the other order concerning the hearing last month, what -- do you know what the agenda number was and can somebody tell me the date of the

hearing so I can add that?

MS. BROWDY: The hearing was on October 31st.

THE COURT: All right.

MS. BROWDY: And that was the only item up.

THE COURT: Okay.

MS. BROWDY: And other than that, again, I think that the status item that we originally had up on the 15th was the issue that rather than deal with all the claims that were at issue on the 15th Omnibus -- and just to refresh the Court's recollection, that's where we raised all substantive objections to all property damage claims, at least that we could, by September 1st. We received on October 24th on the order of 1,000 individualized responses to those, and it was just not feasible within a matter of a week to put in our replies and then to expect sur-replies 4 days later. So we submitted in a proposed order on Certification of Counsel indicating, by the way, that there were disagreements with the proposal that the 15th Omnibus, we should hear certain batches in December, January and February. In December we sought to have argument on certain claims, what we call the category A objections. Those are medical monitoring claims, other things that really weren't property damage claims. Category B claims that were previously settled or adjudicated. Certain of the category C claims where the claimants literally had come up with no proof of product ID. We're not at this point trying to tee up

complexities of is it enough product ID or not enough, is it really ours. This is just, again, the pretty simple is there product ID or not. And then category H claims, which raise a singular legal issue, which is whether contribution and indemnification claims can go forward. Those we propose teeing up for the December hearing. In January we're gonna tee up certain Speights claims, certain category G claims, which were claims from people in Minneapolis seeking recovery for supposed stigma to property, rather than actual remediation costs. And category D, certain state claims that are barred essentially by statute of repose; a little more complex than that, but not much. And then in February we want to tee up any additional Speights claims that weren't covered in January and claims for buildings built after 1973 that really couldn't have Monocoat 3. And we think by, again, tearing off those small bites of claims do not raise complicated legal issues. It's gonna be a very efficient way to continue marching through the property damage claims.

THE COURT: All right, Mr. Baena?

MR. BAENA: May it please the Court, Scott Baena on behalf of the Property Damage Committee. Your Honor, first, I would ask as a point of personal privilege that you not enter the second order granting relief sought in Debtor's 15th Omnibus Objection to Claims, which was submitted to you today. And the reason I ask that, Judge, is I'm not asking you to

deny it either, I'm just asking you to allow us to go back to our office and go through this new Exhibit-A. And I ask that because last week when I got the original proposed order and I looked at the Exhibit-A which was attached, I believe, to the agenda for today's hearing, it struck me that there were claimants listed as not having provided responses or what-have-you in respect of their claims that just didn't conceivably seem to be right to me. And I had my office start calling claimants to find out if it was correct. I found out in one case, one law firm -- and I believe that's the same law firm that counsel just alluded to -- the lawyer that was handling the matter left the firm and the matter had not been reassigned in the firm; it was a big mess and it fell between the cracks. I found another law firm had, in fact, filed responses, but it was recorded as not having filed responses. So I'm getting very, very leary and concerned about the exhibits to these -- these massive exhibits that refer to hundreds of claims. And I do wish to have an opportunity to scrub the exhibit to make sure it's correct.

This has implications on a variety of different levels. Obviously, it affects the claimants claim. And indeed, it does so in the most pejorative way possible, it expunges the claims. Secondly, it affects the universe of claims that we are dealing with in the contest of the estimation, and it could have profound effects there too. So if you'll just grant us

the opportunity of a week perhaps to just go through and ensure that these exhibits are correct --

THE COURT: That's fine. I thought that when I was handed this order up that it had been vetted with counsel and you were satisfied with it.

MR. BAENA: And I just got this new exhibit just now.

MS. BROWDY: And Your Honor, if I could ask perhaps for a slightly different procedural approach. I actually thought there was agreement on it. But the order that we handed up, part of it is the default issue that Mr. Baena raises, but part of it are well over 100 agreed stipulated withdrawals and the like by people who were either dropping their claims or we recognized that they're environmental claims and the like. And I hate to have those continue to float out there when --

THE COURT: No, I think the way to do it is just to have you file a new order on a Certification of Counsel after Mr. Baena has a chance to go through Exhibit-A and they -- that way I'll have everything in one document the way it's proposed. I think that's fine. If he says he needs a week, I think you can file it in 10 days. That should be sufficient. I don't see how it's going to affect anybody significantly for 10 days.

MS. BROWDY: Okay, so the Anderson Order will be entered, but this other one we'll submit in 10 days on Certification of Counsel?

THE COURT: With respect to the order that you handed up on the October 31st hearing, I've signed that one.

MS. BROWDY: Thank you, Your Honor.

MR. BAENA: I've got a comment about that, Judge.

THE COURT: I'm sorry?

MR. BAENA: It -- that's the Speights order?

MS. BROWDY: Yeah, on that --

MR. BAENA: Okay.

MS. BROWDY: Yeah.

MR. BAENA: Okay, I'm sorry. There are a lot of orders floating around. I -- there was another order I wanted to discuss --

THE COURT: Wait, I'm not done with this one yet.

MR. BAENA: Yes.

THE COURT: With respect to the order that I've just been handed up on the 15th Objection, I'm throwing it in the waste can so that you can file it on a new Certification of Counsel and this one will not be signed, unless you want these exhibits back. Do you?

MS. BAER: No, Your Honor. Actually, Your Honor, those exhibits --

THE COURT: That's the order page.

MS. BAER: The exhibits may have (indiscern.).

THE COURT: You may have them all back. The only thing I threw away was the page that had my signature that

wasn't appropriate. All right, so let me make a note. That will be entered when a Certification of Counsel is filed. And you're going to call it second order, correct?

MS. BAER: Yes, Your Honor.

THE COURT: Okay, Mr. Baena.

MR. BAENA: Your Honor, you have already signed, apparently, an order that was submitted by the Debtor with a Certificate of Counsel that was alluded to earlier. The Certificate indicated that there was --

THE COURT: On #6?

MR. BAENA: It's -- yes, it's the Scheduling Order regarding Debtor's 15th Omnibus Objection --

THE COURT: Okay.

MR. BAENA: -- to Claims, Substantive.

THE COURT: All right.

MR. BAENA: There was indeed a Certificate of Counsel, which faithfully represented to the Court that there were objections to the order that was being proposed by the Debtor. Indeed, it's my understanding that Mr. Speights has objected in respect of certain aspects of it, and the Committee objected as well. And I'd like to talk about that and the improvidence of the order.

THE COURT: All right.

MR. BAENA: Judge, this order has been before the Court only obliquely. Last hearing, at about the same time I

was listening to the rest of my roof blow off in Hurricane Wilma, that was what was left from Katrina, I believe Ms. Browdy was approaching the podium and telling the Court about the scheduling issues that were engendered by the massive amounts of information that were being provided by some property damage claimants. And the Court suggested that they confer with parties and work on the scheduling issues. They proposed this order. This order was not proposed to us before last week, I believe, and at the time it was, I immediately responded to Ms. Baer telling her I has some grave concerns about this order.

Your -- the Court will recall that back in March of '04 you had before you the Debtor's proposal for gateway objections to property damage claims. And the issue was are we gonna allow the Debtor relief from local rules to tee up just several discreet types of objections to property damage claims before the Debtor is obligated, consistent with local rules, to articulate all of their substantive objections to PD claims, and the Court allowed that. And one of the concerns that we articulated at that point in time was, Judge, this could lead to a real parade of comic possibilities because by doing it that way, property damage claimants would be subjected to this slow drip of claims objections. And the Court assured us that that was not the Court's intention. Indeed, the Court stated at page 24 of the transcript of that hearing that what the

Court intended was one gateway objection in respect of everybody's -- all PD claims, and then one substantive objection. You went on to say that you would only expect property damage claimants to be before this Court twice in respect of their objections to a single claim.

What the order that you signed does is ensure that we will not have that result because instead of setting down claims for objection and hearing, this sets down subjects for hearing, so that if 100 claims are subject the same sort of objection, that objection will come before the Court on a particular day. If a particular claim is subject of a variety of different objections, that claimant will have to come back to a series of hearings in the cattle car with every other PD claimant whose claim or claims are subjected to the same subject of objection.

THE COURT: Okay, then I think if that's the case, I misunderstood what the process was to be because I thought we were talking about one -- I don't know what the right word is to use for this -- gateway. Okay, let's say we have Claimant A and Claimant B and there are three gateway objections to Claimant A and one different gateway objection to Claimant B. I thought what this order would do is tee up the three gateway objections for Claimant A on one track and a different tee up -- different track for the claims objection on B. I did not appreciate that it was to be each Creditor in each objection.

MR. BAENA: Judge, if the technician could just flip

us on here --

THE COURT: Well, if it is, Mr. Baena --

MR. BAENA: What I would --

THE COURT: -- what I would --

MR. BAENA: Let me suggest to you, Judge, by this order -- we did a little bit of calculation. And by this order, some 380 claimants will have to attend five hearings in respect of objections to one single claim.

THE COURT: Well, that was never my intent, and if that's the impact, then it has to be modified.

MR. BAENA: That's right.

MS. BROWDY: Again, Your Honor --

MR. BAENA: And what we have --

MS. BROWDY: -- that is certainly not the impact, but we'll get to that on the --

MR. BAENA: Well, that is the impact. And in fact, Judge, it's on each of the -- the occasion of each of these hearings, there are going to be property damage claimants there on multiple occasions in respect of objections to a single claim. And we don't think that that's what the Court intended, and we don't think that that's a workable process. And that's why we thought that this would be done just the way it's done all the time in bankruptcy. You set down a claim to be heard for objections.

You know, the other aspect of the unfairness of this,

Judge, is that theoretically there could be discovery that's relevant to the type of objection and everybody's gonna feel constraint to attend the discovery because they're all in that same cattle car.

THE COURT: Well, I'm not opposed to the Debtor doing subject oriented objections. I mean, I -- every objection to claim is subject oriented in -- at it's bottom line. But I am opposed to the Debtor attempting to bring parties back in here more than twice, once from the gateway, once from the substantive.

MR. BAENA: Judge, I don't know that you're gonna be able to have it both ways.

THE COURT: Maybe not.

MR. BAENA: I don't know that that works. I think that in order to avert multiple visits to the Court on a single objection you have to set these objections down by objection. They could be batched, theoretically, if there are, you know, a universe of claims that suffer from the same purported deficiencies. Maybe they can all be brought on at the same time, but it's by claim, so that an -- a PD claimant will show up one time after the gateway objection is heard in respect in of it's claim.

THE COURT: Well, actually, Mr. Baena -- and I know this is getting into the argument on the #5 that I wanted to differ, but I have been trying to figure out a structure by

which the constructive notice issues can be done in batches. And frankly, I'm not sure how it's not going to have to raise an objection to the claim itself anyway, because I really think that's an issues that's going to require some procedural due process to the claimant involved. Now, I don't have that same view, just so you know, with respect to the other issues that they're trying to litigate, but I -- in thinking -- trying to think this through, frankly, it's something I wanted to discuss in #5. It appears to me that we ought to get whatever the procedural gateway objections are out the door to the extent we can. And then I really do think the Debtor is just going to have to file objections to the claims that are left over. I think that's what's going to have to happen, or else we're going to have figure out a way to have some -- I don't want to say class Proof of Claim, that's not what I mean, but class proceeding to deal with the issues that are relevant to a variety of objections to claims.

MR. BAENA: On a claimant basis?

THE COURT: Well, I think the claimants would certainly have the right to be here to participate. Now, maybe the Debtor wants to do an Omnibus Objection. I'm not attempting to set the structure at this point.

MR. BAENA: Okay.

THE COURT: But I can --

MR. BAENA: Judge, we're going to address that in

depth, and I don't want to use this objection as the platform --

THE COURT: For that.

MR. BAENA: -- for that substantive argument 'cause it's much more complicated. But I would like to prevail upon the Court to vacate the order that you entered and send us back to the drawing board. The -- it was -- frankly, Judge, it was unacceptable that we raised the concern, and in the most polite way we were told, "Too bad." And that's not dialogue.

THE COURT: Well, okay, at this point, I don't really want to get into whatever happened outside this Courtroom. I -- the error is mine. I signed the order, apparently, thinking that it did something other than what the parties intend, unless that is what the party intended. I didn't expect that it was going to work the way you're articulating. If it is going to work that way, yes, I need to vacate it, it has to be revised. I think I was pretty clear that I did not expect any claimant to have to be here more than twice. I'm not opposed to claimants having to come in on the gateways, the procedurals, and then separately on the substantive. I think in a case of this size that happens routinely and I'm not concerned -- overly concerned with that. But I am concerned about bringing people back here more than twice.

MS. BROWDY: Your Honor, if I may briefly respond. I ticked off earlier which items we wanted to be heard in

December and January and February --

THE COURT: Yes.

MS. BROWDY: -- and we were very selective about those. Each of those, for examples -- let me take that (indiscern.), please -- that, again, different items for December, January and February. Each of them would be dispositive. For example --

THE COURT: Yes, but the question is as to each of those items, is one Creditor going to be in more than one category? If so, you can't do it that way.

MS. BROWDY: Okay, I don't believe that it'll be multiple times, but here's my proposal. And in part, the reason we broke it up into chunks is because obviously we all know we have limited time at these Omnibus proceedings. I would ask that we get a separate hearing then in January and then all the one's that we identified to be teed up that were in this 15th Omnibus, we just hear in one day in January.

THE COURT: Okay. Well, I think hearing these in one day is -- unless it's simply for further scheduling or some pre-trial orders, you're not going to get through all of these objections in one day, I don't think.

MS. BROWDY: Well, again, Your Honor, we were very selective about what's in there. For example, contribution and indemnification, that's a legal issue, a previously settled or adjudicated claim. Either they --

THE COURT: Well --

MS. BROWDY: -- previously settled it or not --

THE COURT: I think --

MS. BROWDY: -- they were --

THE COURT: I think this is what the Debtor needs to do. I think the Debtor needs to do a chart that says to all Creditors, "Here are the objections that we're going to raise as to your claim." And you need to list all of the objections for all Creditors that you're going to list. Then we need to have a scheduling process that says, "Okay, these are the issues as to these Creditors that we're going to pick up." Now, I realize, Mr. Baena, that that isn't exactly what I said before, but I didn't have a universe of claims to look at when I was hypothesizing how this might be best handled. It seems to me that there may be categories of issues that can be addressed in a mass kind of proceeding as opposed to a claim by claim proceeding. But until we know for sure which objections the Debtor intends to lodge as to which Creditors, we don't know how best to aggregate those proceedings.

MS. BROWDY: Your Honor, that was actually -- that was the 15th Omnibus Objection.

THE COURT: Right, that -- well, that's --

MS. BROWDY: Where we identified each category, and within each category we identified each claimant that falls into it and you can slice or dice it different ways. You can

say under objection A which claimants fall into, or I believe the Court ordered us to provide a list in late September --

THE COURT: I did.

MS. BROWDY: It said for each claimant, each of the objections. So that's already been done.

MR. BAENA: I think we do know --

THE COURT: Okay.

MR. BAENA: -- to a great extent, not entirely. There's -- like this language in this proposed order that talks about the remaining aspects -- and I don't know whose claims that would impact. It was just stylistic, I think, more than anything else. But I think we do know whose claims are affected by what objections that -- the issue though is, taking each one of those objections to a single claim and setting them up for a separate hearing.

THE COURT: Well --

MS. BROWDY: And --

THE COURT: The reason I was suggesting this newest approach -- and I apologize, I -- you have told me that the 15th Omnibus was everything you intended to file, and frankly, I just lost track of that fact. So I agree, you have done that. What I was going to suggest next was, however, you could take a look at -- all parties could take a look at which Creditors are in which groups of objections. And I understand that the Debtor's view in terms of how to best manage the bulk

of objections is the proposal that you've set out. But for some Creditors, that may not work, simply because of the multiple appearances. So what may make sense is to go through this list, find out, for example, how many Creditors have only one or two categories of objections, and deal with those in one proceeding. And then take a look at the Creditors whose claims fall into more than one category. Because, you know, the problem for a Creditor is if they lose on any one theory, they lose. But the Debtor has multiple opportunities to attempt to show how that claim should not be paid. And it's difficult for a Creditor to defend against one thing knowing, "Okay, I won that battle, but I have to come back again." And frankly, that expense should not have to be born by every Creditor in this kind of a case. So when I said two shots at the apple, I really did mean two shots at the apple because I think that's the way, in this case, the economics are most fairly addressed between the Debtor and Creditor constituents.

MS. BROWDY: And again, Your Honor, we'll try and come up with an order that obviously is satisfactory to the Court, but because of the limited time at the Omnibus, again, I would repeat that I would request a hearing date or two in January --

THE COURT: Okay.

MS. BROWDY: -- to tee these up for.

THE COURT: All right, well, I think that's fine, but let me work -- why don't I have whoever, Mr. O'Neill I guess,

contact my staff in Pittsburgh so that we can take a look at a date. Tell me how much time at this point you think you're going to need. Are you planning at this point to do nothing in December, but to put all of these three objections that you would have done December, January and February into one hearing in January?

MS. BROWDY: That would be my proposal because I think as a practical matter we can't tee it up for December. The class -- the Speights proposed class certification issue that was raised at the October 31st hearing, that will be set at the December Omnibus, so we would go forward with that. But the objections that we would otherwise have raised in December, I suggest clumping the December, January and February one's into a hearing in January.

MR. BAENA: The only other issue, if I may, is briefing, Your Honor.

THE COURT: You --

MR. BAENA: The only other issue, Your Honor, is briefing. There has been no briefing of any of these issues by either side.

MS. BROWDY: Actually, that's not correct. We had the 15th Omnibus was filed. We've gotten the responses to the 15th Omnibus. So all that's left is the reply and the sur-reply, and that was covered by a previous order.

MR. BAENA: I'll accept that clarification, but we

need to allow time for that to occur, taking into account holidays.

THE COURT: Well, okay, I guess my -- what I am not sure of, because I don't look at Certificates of Service unless somebody raises an issue about one, has each Claimant been served with the 15th Omnibus so that we're going to get -- we've gotten responses in from any claimant who intends to respond?

MS. BROWDY: Yes.

THE COURT: Okay.

MS. BROWDY: Yes, we have.

MR. BAENA: But they have not been served, to the best of my knowledge, with this order. My understanding is that this order went to the 2002 --

THE COURT: Okay.

MR. BAENA: -- mailing list, which wouldn't include all property damage claimants.

THE COURT: All right, well, it -- since it's going to be vacated and redone, that's kind of an irrelevancy at this point anyway. So why don't you folks see if you can work out a new order that comports with what I've just said, that vacates the one that is of record, that will go out on notice to all parties. And I know you need to get the dates before then. If Mr. O'Neill calls my staff tomorrow -- between today and tomorrow, I'll call them to let them know that you're asking

for two days in January and I'll give you some -- or my staff will give you dates.

MS. BROWDY: Thank you, Your Honor, and then we'll work with Mr. Baena to back out the dates for the reply and the sur-reply.

THE COURT: All right, so this was also on item 6 then.

MR. BAENA: Thank you, Your Honor.

THE COURT: When -- Mr. Baena, when was that order entered?

UNIDENTIFIED SPEAKER: It was Wednesday, I believe.

THE COURT: Okay.

MR. BAENA: Let me give it to you, Judge, it --

MR. TACCONELLI: Your Honor, Theodore Tacconelli. It's Docket #11035, it was entered on November 10th.

THE COURT: All right, Mr. Tacconelli, what was the docket number, again, please?

MR. TACCONELLI: The order was Docket #11035.

THE COURT: Okay, I'll just make a note that that will be vacated and a new order entered when a COC is submitted. And I'm orally vacating that order, so whatever is set up by way of procedures at this point is vacated, but the order -- written order will confirm it. Mr. Speights?

MR. SPEIGHTS: May it please the Court, Your Honor, on this matter you've been discussing. I'm appearing solely on

behalf of my law firm and the clients I represent. And it may be, in light of the Court's decision, that what I want to say could be taken up at December when we are together on the Motion to Certify, but I want to make sure my position is protected. And I informed the Debtor's counsel of my position before they submitted the order, and they noted that I did have an objection. May I approach, Your Honor?

THE COURT: Yes. Thank you.

MR. SPEIGHTS: Your Honor, I really believe I am in a unique position with respect to the 15th Omnibus Objection because as Your Honor recalls, the Debtors filed a 13th Objection challenging my authority to file all of my claims. They later withdrew their 13th Objection as to one building in California. And Your Honor, when they filed that objection they previously, of course, had filed a motion with the Court to seek a waiver of the local rule. And that's what led to our August 29th hearing when I talked for more than an hour before Your Honor. And in their motion, which I've handed up to you just a portion of, which I've highlighted, they represented to Your Honor that they wanted to go forward with these authority objections prior to the Court having to adjudicate the merits of any legitimate claims, that it would save the Court significant time in adjudicating the claims, and that they wanted to do this before dealing with the remaining claims. And I relied on that and I consented. On August 29th I told

Your Honor we welcome the authority objections being heard first, and we had been going forward, and I know we've given the Court a lot of work. I'll assure you my law firm, and I believe the Debtor's law firm, have spent a lot of time going through these authority objections. Your Honor, I relied on that, and I'm engaged in that process now, and I don't think I should have to deal with this 15th Objection on Substance until, as the Debtors the represented when the filed these authority objections, we get through with these authority objections. They said --

THE COURT: Well, are your clients -- are -- your clients, I think, Mr. Speights, are not in the same category as the other Creditors for whom Mr. Baena raised the objection, because if I understand it, the Debtor would be filing objection to your client's claims in -- well, the Debtor proposed two batches, in addition to the authority objections.

MR. SPEIGHTS: Well, that -- then they were -- and that's why I said I may be, in a sense, premature in light of that. I will have a number of objections, like Mr. Baena has articulated, on behalf of the Committee. But the theory of the Debtors -- and while I disagree with almost everything the Debtors say, their theory actually was pretty solid. If we're gonna get rid of a lot of the claims on authority, let's get rid of them first, and I agreed to do that.

Now, having said that, Your Honor, I don't know why the

Debtors, having gone through this exercise, will not now realize that they ought to withdraw the remaining authority objections, or most of 'em. For example, I've got hundreds, hundreds of California colleges and universities I represent under a written -- under two written contracts of representation. But now, in addition to their still having the authority objections on that, they want to litigate the California issues, four, five six issues per California claim. And I think, you know, between now and December, maybe the Debtor could say, "Okay, we've gotten Mr. Speights to agree to withdraw some claims. Mr. Speights voluntarily has withdrawn some claims, and Your Honor has stricken, as of today, 600 claims. Maybe we're close to the finish line." But I have no idea where the finish line is on that authority objection process and one World War fight is enough for me. I don't, in the middle of this authority process, now need to get involved in this other objection process. Again, Your Honor, I'd be happy to discuss this with you in December after the Motion to Certify, and maybe we'll make some progress by then. But I want the record straight that in addition to whatever reasons the PD Committee has, uniquely, we think authority should be decided in moving -- before moving to door two.

MS. BROWDY: Your Honor, if I may be heard? Michelle Browdy on behalf of the Debtors. I certainly agree with Mr. Speights that he stands in a unique situation. Here's someone

who filed 75% of the 4,000 property damage claims that were filed in this case. Since July, 2,300, 2,300 of Mr. Speights have been expunged or withdrawn and he still has 60% of the remaining property damage claims in this case. And now he's saying that because he went and filed hundreds upon thousands of claims with no authority, he should be treated specially and not have to comply with the same rules as everybody else. He is seeking special dispensation on the grounds that he improperly filed thousands of claims in the first place. That certainly cannot be the right approach for this Court to take.

And let me give you an example, when we originally teed up the hearing for October 31st, we said we're gonna try to get through the Speights claims in an efficient way. And we would deal, for example, with the Anderson Memorial claims, for which he had no authority, and we would deal with California claims that he had no proof of product identification, because that was a merits issue that could be addressed simply in one spot and we could get a ruling with an early hearing. We had an agreement that that was gonna be set up, and then low and behold, Mr. Speights withdrew about 1,500 claims that had no product ID. But I use that as an example that to get through these claims efficiently, some of the things we want to tee up early are the authority objections, some of the things we want to tee up early are the merits objections. There's no reason to slow down the merits determinations of the Speights and

Runyan claims when those are gonna help us efficiently get through what remains.

And again, the statistics, Your Honor, I believe that after the Anderson Order was entered and once we get clarity on the default and the stipulations on the 15th that we are going to be down to roughly, from 4,000 claims, we're gonna be down to roughly 1,150 property damage claims. We're gonna have just over 1,000 traditional property damage claims. Of those traditional property damage claims, about 340 of those are Canadian claims filed by Mr. Speights. And then that will leave us with fewer than 700 U.S. buildings that have traditional property damage claims that need to be addressed. We're still gonna be in a position, though, that of the 1,000 -- roughly 1,000 traditionally property damage claims, 60% of those are on file from the Speights firms. We cannot slow down this process. There's no reason he should get, again, a special dispensation --

THE COURT: Well --

MS. BROWDY: -- not to follow the same schedule as everyone else.

THE COURT: Okay, well, where are you in terms of the document production on the authority issues, because quite frankly, it seems to me that that one should be pretty easy. To the extent that there is a written document that provides authority, there's authority.

MS. BROWDY: Well, here's the real issue, Your Honor, is it's been the volume. You know, we started out with 3,000 Speights claims that we had to deal with, and then 200 went away because they were withdrawn. And then we got to the verge of the Anderson hearing and 1,500 of them went away. And we finally -- it wasn't until this morning that we got the order agreed to on the Anderson claims, and that's another 600. So it's been such a moving target, it's hard to see what's left to go back and test what there is or is not authority for. And in point of fact, Your Honor, that's actually why when we had proposed the December, January and February hearings, we had split the Speights into two batches, because we thought it's just gonna take us a while to get through and figure out what's there --

THE COURT: Well then --

MS. BROWDY: -- and we're always trying to tee up the easier things first.

THE COURT: -- maybe the thing to do, rather than giving you a January hearing date, is to give you a February hearing date, because by then you will have been through the Speights authority issues, hopefully, you know -- and at that point in time whatever is left with respect to the Speights claims will fit into the same mold as all the other claims.

MS. BROWDY: Well, actually, Your Honor. Again, now that we've gotten rid of nearly 3,000 claims, we're to a much

more manageable universe. As I said, it's gonna be about 100 or 50 -- 150 or so that are not the traditional property damage claims. Things like contribution and indemnification and the like, we'll deal with those separately. Those are good issues to tee up for a hearing in January, quite honestly -- something like contribution and indemnification. Of the traditional property damage claims, again, once we're gonna be closer to 1,000 I believe it's gonna be much easier to work with the 600 Speights authority claims and we'll tee up some of those in January as well.

THE COURT: Well, of the 150 that you want to tee up, that are the -- for example, contribution indemnity claims -- as to how many of those are you alleging that Mr. Speights didn't have any authority? I mean, why do we need to bifurcate the issues? If you're gonna do discovery on those claims, why can't we just put the authority issue at this point into whatever the objection is on this specific claim?

MS. BROWDY: Right. Again, the January hearing I would think would be both -- again, merits on certain batches like contribution indemnification, then maybe merits objections that go to certain batches of the Speights claims, and authorization objections that go to the Speights claims. But again, Speights shouldn't get special privileges because he filed such bad claims.

THE COURT: Okay, well, I'm not seeing how there are

special privileges. I think you two are saying the same thing. It sounds like a timing problem rather than an issue as to the procedural process.

MS. BROWDY: Again, I think these all can be teed up in January, Your Honor.

MR. SPEIGHTS: May I respond to that, Your Honor?

THE COURT: (No verbal response).

MR. SPEIGHTS: Thank you. Three simple sentences, Your Honor. I'm not trying to get special dispensation. I've been out front not because I had bad claims, because I had the most claims, probably. I'm simply trying to enforce the proposal and the agreement that I relied on to go first with authority. I think I have every right to say that's what the Debtor proposed and I agreed to it.

Number 2, Your Honor, unfortunately, Counsel just said to you two or three times, "Well, Mr. Speights has these bad claims he withdrew" -- and I can't remember the number, was it 1,000 California claims on the eve of the hearing. Those are the so-called conspiracy claims. Those are the claims that I=ve told you often I talked to Mr. Beeburn, was to think about before they ever started this process. I consented to an agreement. I proposed they be done, and I consented to a written agreement that I negotiated with Ms. Browdy in which the Debtor said it would never stand before Your Honor and try to say that I had done something improper by withdrawing those

claims. And here we go. You know, when I withdraw 'em, I'm jumped upon. I withdrew them and Mr. Beeburn and I could have worked out those claims a year ago but that doesn't mean they were improper.

Number 3, Your Honor, Counsel has just told you that it was only today that we got this stipulation. Well, I dealt very pleasantly with Ms. Baer on the Order. We got the Order. We have a little problem on emails between one of her associates and one of my associates. We agreed to the Order but we had to go through those attachments of 600 that Mr. Baena was describing to you today. You've got to be real careful. For example, they had the Anderson Memorial Hospital -- the individual building which I've litigated since 1992 with Grace on that list that you would have signed and expunged their claim. So it takes some time to go through those.

So, Your Honor, again, I suggest that we discuss this in December and see where we are, but if I've got written contracts -- you know, for 500 or 1,000 claims, and they've got 'em. They've got copies of the contracts for the California Universities. Why am I being put through this ordeal of going through authority objections, but if I have to, let me --

THE COURT: Well, I don't know --

MR. SPEIGHTS: -- enforce the agreement they proposed.

THE COURT: If -- to the extent that there are written agreements it seems to me that it -- that -- it's not an issue

that needs to be litigated. I'm not sure how the Debtor will win an authority issue if in fact there is some authority that's in writing. So, I don't know the answer. I haven't seen the documents, Mr. Speights. I'm not trying to make rulings. I'm just trying to get through the process.

It seems to me that the process ought to be that you take one more stab at looking at the volume of authority issues and at the end of that time, if there is some agreement that additional claims ought to be expunged, or disallowed, or whatever because of lack of authority, fine. And what's left ought to just go into the traditional objection to claim process for whatever else the issue is going to be on that claim. And if there's a lack of authority, we deal with it for that specific Creditor in that specific claims objection. Because I'm not going to hold up the process simply to bifurcate out the -- your client's claims, Mr. Speights, to do that pretty much means bifurcating out most of the process. So it won't work. But by the same token, I agree that you need a structure in place in order to be able to deal with the Debtor's objections.

MS. BROWDY: Your Honor, if I may respond just briefly. First, I did not intend to imply that there was wrongdoing in the withdrawal of those claims. I mean, part of the agreement to withdraw those 1,500 claims --

THE COURT: Look --

MS. BROWDY: -- was to say we're not arguing it was wrongdoing and again it was not my intention. It's simply a fact there are a lot of claims falling by the wayside which makes it a little hard to track along the way. But again, I did not wanna suggest there was something improper about the withdrawal.

In terms of the written agreements, again, it would be my intent to try to tee up in this January proceeding -- or to tee up in the proceeding, authority objections. But I wanna clarify. We have always proposed that we wanna stage the property damage proceedings in an efficient way to get -- you know, that's why we teed up 600 Anderson Memorial cases, 'cause you could do one argument and deal with so many claims. The written authority issue with Mr. Speights may well raise discovery issues. You know, we have not yet taken Mr. Speights' deposition. If we can -- we have not sought the depositions of the people at the University of California that supposedly signed his contract. If we can get rid of some of the Speights claims on the merits, it could reduce the need or perhaps even eliminate the need to do the discovery. So I'm not saying right now I wanna give up the right to depose Mr. Speights, we may well --

THE COURT: No, no, no.

MS. BROWDY: -- need to.

THE COURT: Look. If there is a written document that

was signed within whatever the relevant time is -- unless you've got some reason to suspect or want to take a deposition to verify that in fact it's the person whose signature was -- it's purports to be on that document, I don't know what other information the Debtor has the right to contest. You clearly have the right to take a look at claims that are filed without authority because they're improper claims. And they shouldn't be filed. And it's improper to file them, and if the Debtor won't say it, I'll say it. And I don't want to see it happen in other cases. That's the reason we're going through this process in this case. But to the extent that there is written authority, I don't know what information the Debtor needs other than to verify that in fact it's a client who signed it.

MS. BROWDY: Well, what about the issue again that the Court just raised? If there are written agreements within the relevant time -- I've looked at some of the written agreements that the Speights firm has given to us. Some are signed late in 2004. Some in 2005 as part of this process. That does not mean that he had authority in March --

THE COURT: So take the depositions or send out a written interrogatory or do whatever you want to do in that score. I don't see that that issue at this point should be holding up the rest of the objection to claim processes.

MS. BROWDY: Right, well -- exactly, Your Honor. That's why our proposal would be to tee up both authority and

merits objections. We're trying to tee up the easy ones, so if I can go after authority ones that aren't going to raise evidentiary issues like the Anderson Memorial ones we did it -- if we can tee up merits objections to Speights claims that don't raise evidentiary issues we'd like to do it --

THE COURT: I think I've given you the parameters. I don't think I can say anything more. Okay? The parameters are, not more than twice will any claimant be here. If the Debtor can't take two shots at this apple and disallow a claim as the result, then the claim's going to get allowed and dealt with somehow or other. That's it. That's my bottom line parameter. I don't think I can be any more clear than that. You folks can attempt to work out the Order that determines how those batches will be done. If you have some disagreement, call me on the phone and set up a hearing by phone to discuss it. I want this issue done before the next Omnibus, not at the next Omnibus.

With respect to the -- Mr. Speights, with respect to the issue of getting this teed up for January, I mean, I don't see that there's a great difference between January and February unless something helps your schedule particularly one way or the other. If it does, I mean, these cases are going to be here. You've got lots of plan confirmation issues. I want the Debtor to march along, and as a result I want the Creditors to march along, but the difference between January and February in

the grand scope of things isn't going to mean much.

MS. BROWDY: And, Your Honor, if I can clarify, one of the reasons we want January is because the objections process is going in parallel with the estimation process, and in February we're going to get to the close of discovery on Phase 1. We're going to get to briefing the Daubert issues. The things we're going to be discussing on item 5, January's a more clear time for us to do it. Again, February bumps up against Phase 1, that's why we asked for January.

THE COURT: All right. So, Mr. Speights, if I pick a date that's sometime in January, can you live with the fact that you'll work with the Debtor to see what other authority issues can be dealt with in batches, and to the extent that there aren't any then the issue of the authority will simply be another issue that will be part of whatever other objection claim as to that building the Debtor's raising, or that client of yours that the Debtor is raising.

MR. SPEIGHTS: I understand what Your Honor wants and I'm not gonna sit here and argue with Your Honor. I would request, Your Honor, to direct the Debtors, now that we're going through all of this authority and now that they've heard what you've said today about your views on authority and having a signed piece of paper for them to let me know at some reasonable -- within a reasonable period of time -- a week or 10 days -- which ones they are not going forward on, on

authority objections. Because I believe that at the end of the day the Debtors will not go forward in light of what Your Honor said on a large number of these claims for which I have written contracts, pre-bar date.

MS. BROWDY: Your Honor, I'm not adverse to letting Mr. Speights know which ones we will or will not be going forward on authority grounds. As a practical matter, it's not going to be a week or 10 days. As we've mentioned earlier, I'm on trial in Spokane right now. It's likely to go through Thanksgiving. But we can certainly let him know that before the December Omnibus.

THE COURT: All right. Mr. Speights, they'll get to you before the December Omnibus so that we will know at the December Omnibus what else is going to happen with respect to objections to your clients' claims. Okay, having gone through all that, is there any Supplemental Order that I need or is this going to be taken care of in the Order that's vacating the November 10th Order and then adding -- and setting up a new process?

MS. BAER: Your Honor, I think given you've vacated the November 10th Order, we will then work with Mr. Baena and Mr. Speights to submit new Orders --

THE COURT: All right.

MS. BAER: -- dealing with this issue or contact you if we have issues we have to deal with.

THE COURT: Okay, thank you.

MS. BAER: Your Honor, at this point, it is 1:15. So it probably makes sense to take up agenda item #5.

THE COURT: Probably does.

MR. BAENA: Can you give us a sense of what our timing is today? Do we only have 15 minutes to cover these two pretty substantial issues?

MS. BROWDY: I'd be happy to do it in 15 minutes, Mr. Baena.

THE COURT: Well, Kaiser is set to start at 1:30.

MR. BAENA: Okay.

THE COURT: So that's 15 minutes. Unfortunately, Kaiser's probably going to get a little delayed as a result. USG has nothing going forward this afternoon, so I think I can allow a little slippage so that we'll start Kaiser -- let's say at 2. So I'll give you until 2.

MS. BROWDY: Okay.

MR. BAENA: Would you like to dispose of Kaiser now and then we can come back and finish in --

THE COURT: It's --

MR. BAENA: -- one fell swoop?

MS. BROWDY: Your --

THE COURT: I think, Mr. Baena, that Kaiser's going to be just as bad.

(Laughter)

MS. BROWDY: Yeah. Yeah. Your Honor -- and I'll be very, very brief. I'll try to finish my remarks within 10 to 15 minutes. The issue we have right now is a procedural one. How do we structure Phase 1 of property damage estimation to deal with the issues of constructive notice and the Daubert applicability to dust sampling? The property damage estimation CMO, which is Docket 93-02, already calls for a Phase 1 estimation to deal with these two issues. We've already as the Debtors submitted our fact and expert disclosures on October 17th. We submitted expert reports on the Daubert issue, and we submitted expert reports and disclosures on the constructive notice issue.

THE COURT: Look, can I see if I can cut through this? Because I have spent my entire weekend reading item 15 and all of the -- or 5, pardon me -- not 15. And going through these reports and I have some preliminary views. And so I think at this point, I should just go to the preliminary views and see where we stand.

On the Daubert issue with respect to the dust sampling, I think it is appropriate to go forward with that on a Daubert hearing in advance. To the extent that you are prepared to argue whether dust sampling is an appropriate technique for the circumstances, I think we need to set up an argument. I'm not sure what other papers you folks want to file on that issue but I think it's appropriate to go forward en masse on that issue.

On the constructive notice, frankly, I think the Debtor is going to have to put that constructive notice issue into the claims objection process that we've just been discussing on item 6 and figure out claim by claim whether or not the Debtor is going to raise -- and it's actually in the nature of an affirmative defense. I think the constructive notice issue -- because it's really a statute of limitations issue. So if I treat the objection to claim as {in quotes} "the complaint," and the Debtor's objection to it as {in quotes} "the answer" -- which raises the constructive notice issue then I think we need to get whatever factual discovery, if any is appropriate, done on those constructive notice issues. I'm not sure that you need any. It may be a matter of law. I don't really know enough about the State laws to know what your views will be about that. But to the extent that you need some discovery I think it can be limited because certainly whether Grace product was installed in a specific building and when is going to be the start of when that limitations period will start in any event. It can't start before that date no matter what. It has to start on a date in which there was some product that's installed in a building and then whether or not the -- you know, there was some change to the building. For example, a renovation that may have clued somebody in by way of actual notice that there was asbestos -- may be an issue. Whether there has not been any change to a building may be an issue.

I'm hypothesizing. I don't know what all the issues are that you'd want to raise, but I'm suggesting that if you need discovery we should build it in and then I think we can tee up probably by way of a Summary Judgment process -- once you get those known facts in place, whether or not there was constructive notice. That's my guess.

If I'm in error and there are really material facts in dispute then maybe it can't be done on a Summary Judgment process. And I think there may be issues where the Summary Judgment will have to be filed by claim but the arguments can be addressed at one time. For example, the law applicable in California is going to be the law applicable in California. How it applies to a specific building may be the focus of the Summary Judgment argument. And that may vary depending on when the product's installed, what evidence there is, whether there's been a change -- a whole host of factors. I'm not attempting to articulate them all. So, those are my preliminary views. I think that Daubert works in this fashion. I don't know that the constructive notice does.

MS. BROWDY: Okay. Let me respond then, briefly just on the constructive notice point. In our 15th Omnibus objection, we have raised objections to individual claims on the grounds of constructive notice. So we have an exhibit to that 15th Omnibus -- I believe it's Exhibit D-2 but we can double check. So we know exactly which buildings are at issue,

which states they're in and the like. So we again, know who's going to be affected. And I don't have the exact figures in front of me but my guess it's gonna be most if not all of the traditional property damage claims. 'Cause the whole point is this information has been kicking out for so long. And in fact if you look at our expert reports I think we say it's the late '70s, early-mid '80s, something like that by which time people should have known.

We also know that for example, Grace Monocoat-3 product -- that's off the market by '73 or that era. So we know the buildings would already have it if they're bringing claims and that sometime after that we think constructive notice kicked in. And our proposal then has been to use Phase 1 -- we understand it's gonna be a state substantive standard on constructive notice and that rather than tee up all the claims -- although if we were instructed to by the Court we could -- we thought that it would become easier in Phase 1 if we took the chunks that we made objections to on the 15th Omnibus, the D-2 constructive notice and took in the most -- essentially the most populous states that has the most claims, it's largely going to be California -- that's about a third of the U.S. traditional property damage claims. Louisiana is also a big chunk but we agreed at the request of the counsels affected by Katrina to take Louisiana off the table. But certainly at the time we put in our papers, California, New York and then we

thought Louisiana were the top claims that had the most number of claims in there. And we thought by focusing on those early it's a manageable number of claims. For example of the California, I think it's on the order of --

THE COURT: We're -- I'm losing track of what you're trying to tell me.

MS. BROWDY: It's that lets tee up California and New York claims on Exhibit D-2 as part of Phase 1 constructive notice. I don't think we're on any different page than the Court's on.

MR. BAENA: Well, I disagree. I disagree completely. As I heard the Court, you have concluded and obviously we completely agree with the conclusion you've reached, that this matter can't be approached on anything other than a claim by claim basis because it's based upon knowledge as a fundamental element in any state, it's based on knowledge. And I heard Ms. Browdy agree with you and then reel right back to the same proposal that you just said won't work.

Your Honor, the illustrative examples that you gave of the kinds of -- Omnibus facts, if you will -- that might need to be developed really aren't the facts at all that need to be developed here, in all due respect. Ms. Browdy is correct, the large majority -- or the state with the largest number of buildings, I should put it that way -- is California. Now, parenthetically I'll tell you that does not necessarily mean

California law applies to those. But the largest number of buildings in a given state is California. Louisiana appears to be next but they're off the table. New York was third, however, with the expungement of the Speights and Runyon claims that were in that state, New York fell to eight in terms of the number of buildings that are in that state.

The clear majority of jurisdictions are contamination jurisdictions, Your Honor. In order for a claim to accrue -- accrue -- in those states you have to prove -- you have to have contamination in your building. You're quite right. The issue of constructive notice is an affirmative defense, it relates to statute of limitations. And in the large majority of jurisdictions and clearly in the state of California, there are two cases directly on point that I couldn't have done better if I ghost-wrote those cases. Those cases make it absolutely abundantly clear that the burden of proving when contamination occurs for purposes of the statute of limitations, is on them. Not on the claimant. On them. The claimant only has to allege and prove the fact of contamination. The claimant does not have to prove when the contamination occurred, and for them to invoke the discovery rule in any of those jurisdictions the burden is on them.

And that's why their proposal is so bad. Because their proposal attempts, mischievously, I might add -- to shift that burden to PD claimants. So any time Ms. Browdy reels back to

that proposal, my hair on my neck is gonna go up because that proposal just doesn't work. And Your Honor, when a building was contaminated is obviously different from building the building. And when that owner should have known or knew of the contamination is entirely different. But it's their burden. We're not turning the totem pole upside down. We're not creating federal common law. We're not saying California -- they don't really know what they're doing, let's change the law out there. That's the law. And so if they want to go take discovery now about when contamination occurred, I suppose they're allowed to do it. But it's a claim by claim analysis. And I think that's all we can say about constructive notice at this point in time. It has nothing to do with estimation, Judge, as a result. It is not part of Phase 1. We've got to tell Ms. Browdy that we are not going to talk about constructive notice as a Phase 1 estimation issue because there aren't any Claimants in this room that are participating in that Phase 1 process. The estimation is between us and them. And this is a very individualized analysis.

THE COURT: But if we're going to do objections to claims one by one, what are we estimating? I --

MR. BAENA: Oh, Judge. Thank you, Judge. I agree with you, Judge. We have said from the very beginning that you know -- Judge, don't have a bar date, let's just estimate what the claims are. We will review it. Court decided to have a

bar date. We then got Proof of Claim forms and somehow, Judge, we ended up with the worst of every world. We've got claims objections going on. PD Claimants are defending themselves. Some regularly on a full-time basis. Some who will be confronted with multitudinous appearances before the Court. And then we have the estimation process down this other track. Which is really not gonna chug along any faster until we identify the universe of claims.

And so if claims fall out of bed because of constructive notice, or because the statute of limitations generally -- that's -- that informs the estimation process. But it's not the same process. And that's what this Debtor has done, and that's the part of the presentation that is so dangerous to forget -- that there are two very dissimilar processes going on. They're not one and the same. They're not the same parties. They're not intended to end up with the same result.

All we're doing in estimation judge is coming up with a number that anybody that proposes a plan has to fund in order to pay PD claims. That's the worst-case analysis. That's the absolute worst-case analysis. It does not mean that you can't or a trust can't disallow a claim. It just means that if the claims are allowed, you're gonna have to pay 'em. This Debtor's plan is 100 cent plan. You want to insure that 100% of the allowable -- not allowed -- allowable PD claims can be provided for. That's what the process is about. The process

for allowance and disallowance of claims -- individual claims -- entirely different process.

And if we accept the proposals that the Debtor is proposing, they're creating a calculus that only benefits one constituency. Just one constituency. Equity. Because they would have you determine a smaller number for the aggregate estimated value of property damage claims and then they don't care what happens in the allowance process. Because if a claim that you predicted was worth 0, is allowed at 100 cents, there won't be enough money to pay every PD Claimant. That's the problem here.

THE COURT: Well --

MR. BAENA: And that's why we have these separate paths and the difference between the two has got to be absorbed and the impact of each on the other has to be recognized and not confused. And so I say, obviously I feel very strongly, Judge. But constructive notice issue is an individualized issue. It is not part of this estimation. Let them go forth but not here.

MS. BROWDY: Your Honor, just briefly in response, all property damage claims are before the Court. We had notice in a bar date and as we've made clear from asking for the Phase CMO process, the estimation process and the claims objection process can and should work hand in glove. We know what the California claims are that we've made constructive notice

objections to on the grounds of statute of limitations. We can tee up an estimation hearing to ask what is the standard of law in California for the adjudication of constructive notice? You know, is there a constructive notice statute -- standard, and what is it? And then second, assuming there is one, and we think there is -- what is the date that people in California were on constructive notice?

THE COURT: Okay, well, I think maybe this isn't an estimation issue. It might be a Summary Judgment issue as to whether or not there is a set standard for constructive notice, pick any State law, I don't really care. Let's just use California as an example because if the objection to claim is based on the fact that under California the statute of limitations ran and on top of that constructive notice applied as of a specific date and therefore the statute ran, then maybe that's a legal issue. But I think Mr. Baena is correct, from limited research I've been able to do so far, I don't think you can knock out every building in California by saying that as of a certain date everybody in California knew that asbestos in a building created some property damage claim that should have been addressed by the -- should have been raised with and then addressed by the Debtor.

MS. BROWDY: Well, here's exactly the procedure that we're asking for, Your Honor. Under estimation, the Court has a great deal of flexibility to set up a procedure. The Federal

Rules apply, the Federal Rules of Evidence apply, its underlying claims are guided by State law, but again, the procedure that the Court sets up to do it -- again, under Bittner and other cases you have a lot of flexibility. We have proposed an estimation proceeding that for -- we actually again suggested for California, New York and Louisiana. Now it's looking more and more like California makes the most sense, to have an estimation to say, you know, what can you do in an estimation? You can do findings of fact and conclusions of law. What's the legal standard for California under constructive notice, what -- I mean, you have the authority to make those findings.

THE COURT: I don't think that's estimating the claim. I think what that's doing is determining by way of a judgment whether you have an allowable claim that can go forward. Because I would not be determining the value of that claim. Let's say that I decide -- again, hypothetically, just to get to the point -- let's say I decide that in fact, California's constructive notice statute is not applicable to whatever claims objections the Debtor raises. That doesn't tell me that the claim is allowed at a certain value. It simply tells you that that defense doesn't work. So it doesn't estimate the claim.

MS. BROWDY: Well, but, see -- exactly. That's why we're saying this is Phase 1. It's Phase 1 of a two-phase

process --

THE COURT: Then --

MS. BROWDY: And again, we're trying to -- again, figure out and make Phase -- the ultimate goal is to make Phase 2 estimation of the remaining buildings a manageable task.

THE COURT: Well, I --

MS. BROWDY: We --

THE COURT: -- think it -- I really don't see how this is going to be done on something other than a claim by claim objection. I agree that we can aggregate issues for the equivalent of a Rule 42 type of procedure, and to the extent that you have this objection that you want to raise as to every building in California that's filed a claim here, it may make sense to tee up the argument on those -- on that motion collectively. You know, just because I say Creditors don't have to come back here more than twice doesn't mean that we can't bifurcate issues in some case management process that makes sense. And maybe it makes sense to pick out these big-chunk issues and maybe this is one of them. But I don't think it's an estimation process. It's a Summary Judgment process you're asking me to determine as a matter of law that there is a constructive notice statute, that it means X and that it applies to these cases in Y fashion.

MS. BROWDY: Actually, we're not asking for that Y application until Phase 2. I mean, that's why we're splitting

it up. If we just have the finding, what's the legal standard and what's the date, we can then seek disallowance of the claims, we know which the claims are or we can seek --

THE COURT: But the date may be different depending on each building.

MS. BROWDY: Well, again, we actually don't believe it's an individualized issue. Again, we're seeking constructive notice finding, not the actual --

THE COURT: Well, I understand, but constructive notice still depends on -- under every State law -- on certain underlying facts. And I don't think you can make the broad leap to say that because asbestos is in a building that for example, again, all hypothetically -- you know, the owners have changed five times in the past 20 years. No renovations. None. Ever. Have ever been done in a building. The current owner doesn't know whether there was any asbestos in the building because no -- nothing has ever prompted the owner to even think about the issue for whatever reason. You have to prove that that owner had some reason to have constructive knowledge.

MS. BROWDY: But, Your Honor, again. This is why we're seeking to split this up. Because to do it as part of estimation Phase 1 we wanna again do chunks -- generalized issues and that's why, again, if we have a finding of what date of constructive notice and the legal standard, later we can see

--

THE COURT: I think --

MS. BROWDY: -- are there individualized issues --

THE COURT: -- I just addressed the date. I don't think you're going to get a finding. I may be wrong. Maybe your discovery will show you that the same date applies universally to all 1,500 buildings. I -- that -- seems to be a pretty quantum leap, but maybe not, you know. Maybe the same day will apply. I don't think you're going to get there in a Summary Judgment phase.

MS. BROWDY: Oh --

THE COURT: But you may. But you're going to need discovery to do it. You're going to have to make the allegations that say Building Owner X had constructive knowledge as of a certain date.

MS. BROWDY: So the proposal is that we tee up a Rule 42 Motion before the Court?

THE COURT: Well, no. I think what you need to do is tee up the objections to claims. Let's get briefing with -- or discovery, if that's what you need -- as to the issues that are going to be relevant on a constructive notice issue. And then tee up those briefs, people who wish to participate will and maybe at that sense it does make sense to join them all for purposes of decision because the issue may be the same.

MS. BROWDY: Okay. And can we get that on the

schedule to tee that up as -- because we have dates blocked out in March as is, to back those up?

THE COURT: If you can do the discovery.

MR. BAENA: I'm sorry, tee up?

MS. BROWDY: Again, the California issue.

MR. BAENA: Well, Judge, I think Plaintiffs ought to have a right to complain about these issues being treated as Rule 42 common issues.

THE COURT: Well, I'm not saying that that's the way to do it. I'm thinking that it may make some sense to go that way after we get the briefs in and certainly -- whether they like it or not, if I think that the same issue is going to be decided the same way, we're going to consolidate them for argument purposes.

MR. BAENA: I understand. But on briefing, Judge, you'll come to a different conclusion, I'm confident, but what I hear counsel urging you to do is give her a date now when that common issue will be heard, and I don't think we've accomplished the first step -- should it be heard on a common basis?

MS. BROWDY: Well, again, I think that the Court has already indicated that, again, for rules -- for a state like California there are gonna be some common issues but we can -- we know even more than that. We know there's on the order of, again, let's say 225 California claims, or so, 200 of those are

represented by Mr. Speights, and I'll lay you odds he's gonna tell you that most of those are the California universities. So we're only dealing with a few counsel to begin with. So -- and again, they already know constructive notice has been called out in the Phase 1 -- in the CMO as something that we teed up in March, so again, the timing would make sense.

THE COURT: Well, if the discovery on the issues related to the constructive notice can be done in a fashion that gets you to file whatever appropriate Motion for Summary Judgment you're asking for, and let the other side respond and get the affidavits and briefs, I don't have a problem with an argument on those issues in March. To the extent that the issue is the same, i.e., is there a constructive notice statute that is applicable and if so what factors do I need to know to apply it to a specific building and if in fact the facts are agreed upon, whatever you folks decide are the relevant facts. And I can do the whole thing by Summary Judgment. We're going to do one argument where everybody can have their peace.

MS. BROWDY: Thank you, Your Honor.

MR. BAENA: Not in the context of the estimation, Judge, but in the context of objections to claims.

THE COURT: Yes.

MR. BAENA: Correct?

THE COURT: Well, yes, but I mean, the Debtor --

MR. BAENA: The --

THE COURT: I think the Debtor is using the concept of estimation the same way that I'm thinking in terms of Summary Judgment, and their phases really are trying to address legal issues that will then get you into the valuation phase. So for the Phase 1 issues, which are a subset of legal issues, yes it's a Phase 1 issue. It's part of the estimation process but I'm not looking at it as an estimation issue. I'm looking at it as a Summary Judgment issue because if it knocks claims out, they're not going to be estimated.

MR. BAENA: Judge, I appreciate that. And I only raised it because I don't want there to be any misgivings about the fact that Claimants have to be involved in the process.

THE COURT: Well, they've said they've already served the objections on the Claimants.

MR. BAENA: That's correct. But the Claimants have to be involved in this process of --

THE COURT: They have to be if they choose to be.

MR. BAENA: Yeah.

THE COURT: If they don't choose to be, they don't have to be. They've been served.

MR. BAENA: Well -- look, no. Let's back up for a second, Judge. The issue that frankly we think is misguided is whether or not you can bundle claims in California for purposes of determining a uniform date by which all California Claimants received constructive notice such that --

THE COURT: Well, that's --

MR. BAENA: -- their claim became time barred.

THE COURT: Right. The Debtor's proposition is that one date is going to be a means all and end all for everybody. I'm not convinced that that's the case.

MR. BAENA: Okay.

THE COURT: But that's the Debtor's proposition and maybe that's what they'll prove.

MR. BAENA: Okay. I agree with you. In fact, I can't even conceive of how the argument is made in the face of the substantial law that expressly holds to the contrary in California. Now, with that, what is the process, then, Judge?

THE COURT: The process is that the Debtors will file Motions for Summary Judgment as to whatever this issue is. You can do it first and then do the discovery, which --

MR. BAENA: As to claim objections, though.

THE COURT: As to claim objections.

MR. BAENA: Okay.

THE COURT: Okay, so -- and it may be appropriate to have those Motions filed first, then open it up for discovery, then get some responses filed or get the objection and the responses and then open it up for discovery. Then get the briefs in. So that we can see whether or not you could stipulate to the underlying facts. The discovery may be more focused if the issue is raised first rather than just on

wholesale opening up discovery. May make more sense to do that. And they want to start with California. Fine. So we'll start with California. Clear? Okay?

MR. BAENA: I hear you. We need to --

THE COURT: Work out.

MR. BAENA: -- notify Claimants about how this works --

THE COURT: Well, sure, they'll get notice of the Motion for Summary Judgment. And if they choose to respond they will. And if they don't, the order that schedules it will tell them that there will be a default entered against them and they won't have another opportunity to challenge it later.

MR. BAENA: And I presume that the Committee can weigh in as amicus on the issue, Your Honor?

THE COURT: The Committee is entitled to appear and be heard on any issue, Mr. Baena. We're always delighted to have Committee involvement in cases.

(Laughter).

MR. BAENA: Thank you.

THE COURT: With possibly one exception that I addressed earlier in a different case today. Okay? Is this -- does that -- well, that addresses the constructive notice. Now on the --

MR. BAENA: There's only one housekeeping issue that emerges as a result of your ruling, Judge. And that is, the PD

CMO, which governs the estimation of property damage claims, left it to this hearing to determine what the shape of Phase 1 would be. And so we need to -- I suppose -- enter an Order that states that constructive notice is not going to be heard as part of Phase 1.

THE COURT: Well, no. I don't think that's quite right. I mean, we're not using the same language trying to get to the same point. I'm saying that this Phase 1, if you want to use the Debtor's words, can include Motions for Summary Judgment that address peculiar legal issues or specific legal issues applied to specific claims. That's an appropriate use of Phase 1. So to the extent that the Debtor wants to say Phase 1 is going to be Motions for Summary Judgment directed against buildings in California on -- or owners, whoever -- Claimants in California, based on the applicability of California constructive notice provisions, that's an appropriate {in quotes} "Phase 1 determination." The process by which we get there, however, is not what the Debtor has asked for. I'm agreeing with you that the process has to be an objection on a claim by claim basis.

MR. BAENA: Okay.

THE COURT: But it is, in the Debtor's view, a Phase 1 issue.

MR. BAENA: I do understand that, Judge. And the only reason I raised it was because under the CMO, depending upon

the outcome of this hearing, the PD Committee has additional responsibilities too. For example if you said we're going to do constructive notice as part of Phase 1, then we would have to submit expert reports in December -- early December. All of that is by the boards now. And that's the only reason I was asking for us to enter an Order which would -- relieves the PD Committee of having to do any more in respect to the constructive Trust -- constructive notice issue.

THE COURT: Okay. Well, somebody hopefully is going to tell me what the law is, if you don't agree with the Debtor's view.

MR. BAENA: Well, we'll be there to tell you what the law is, Judge.

MS. BROWDY: And then just for a clarification, under the CMO -- the PD Committee will presumably be putting in reports on dust sampling in -- consistent with the terms of the CMO.

MR. BAENA: We have an obligation for both Phase 1 issues. If you decide to go forward then we heard you decide to go forward.

THE COURT: Yes, I think the dust sampling issue --

MR. BAENA: Is there any point in trying to persuade you not to go forward on methodology?

THE COURT: On the dust sampling? If you want to argue whether dust sampling is appropriate to determine the

quantity as opposed to the fact of contamination, we can go forward because, frankly, from everything I've seen so far I'm prepared to knock that out. And not permit dust sampling.

MR. BAENA: Well --

THE COURT: In this case for reasons which I really don't want to take your last 15 minutes to go into. That's my preliminary view. But I haven't heard -- I haven't seen your expert reports. I haven't addressed the specifics of the issue. I'm taking this all from the briefs and this testing standards that have been given to me and the research in Armstrong and a couple of other cases that I've read. That's all. So --

MR. DIES: Your Honor, Martin Dies, Special Counsel for the Committee. I certainly have heard what you just said and I hope you will give me a few moments to try to persuade you differently. At least as to treating this as an overarching issue.

THE COURT: Oh, it is an overarching issue.

MR. DIES: Well, respectfully, Your Honor, I don't think it is, the way the Debtor has framed it. And I will try to cut to the chase and get to the heart of the issue here. Your Honor, in the July hearing Your Honor made the statement that she did not know if the Armstrong ruling would be applicable to the products in this case because of the difference in the products.

THE COURT: Right.

MR. DIES: That in fact is a substantial difference.

THE COURT: There is a substantial difference but so far in the record I have no information that indicates that what the Debtors -- how the Debtors' product has been -- I'll use the words misused. That is, I know that the Debtor has -- Debtors' product is an asbestos wall insulation that is generally applied in some liquid format according to the information that's in the record so far. I know that it can be encapsulated in some cases. It can be covered up in some cases. It may not even be accessible to being in a state which makes it friable at any point in time. There are significant factual issues as to whether the Debtors' product is friable, from my point of view, I mean, from what I see on the record right now.

Judge Newsome determined that among other things -- that the Armstrong floor tile was not friable and therefore the dust sampling wasn't even a fit for that case. But in addition, he went into great length to go through the standards that applied to dust sampling and why the collection methods can't be replicated, the results can't be replicated, the process by which the fragments are sonicated means that there is no means of telling whether or not the same amount of asbestos fibers in the same length and the same volume existed before the process as opposed to after. All of that means that it's not reliable.

I've looked at the briefs. I've looked at the standards that have been attached to the briefs in these cases and I think he must have done the same thing. And from just looking at that, I'm pretty much of the same view. Now, I haven't heard the arguments. I'm only giving you a preliminary sense because that's what I said I would do. So I'm giving you my preliminary sense. I think dust sampling can be used for one purpose and that is to show that in a place there is contamination. But at this point in time, I'm not sure that that's the issue. The issue is is there an unreasonable risk of contamination? And I don't think dust sampling is going to be a fit for that purpose.

MR. DIES: Your Honor, may I respond?

THE COURT: Yes.

MR. DIES: At least briefly. First of all, Your Honor is correct. Judge Newsome said that dust sampling could -- can be a useful tool to quantify the amount of asbestos. The reason that's important, Your Honor, is because in reality, the products at issue -- fireproofing or sprayed or troweled on acoustical products are friable by definition. They're friable by definition -- by EPA definition and three decades of regulations that have addressed these products. There's absolutely no question about it.

THE COURT: If that's the case that they're friable and they've been in buildings since 1973, we know the last one

was -- last product -- at least, I say we know, from this record -- was applied in 1973. Then I think by now people would understand that there are asbestos issues that are related to a specific product in a specific building. If -- I didn't say that very well.

What I'm trying to get to, I guess, is to what I said earlier. This type of product could be, for example, above the ceiling in this room. Okay? It may never result in anything that becomes airborne and causes a problem. It may never do that. So if it doesn't, then to use Mr. Baena's word, there is probably no contamination. Without contamination, there is no claim. Without a claim there's not something that we have to address. Now, whether or not there will be contamination because this claim is somehow contingent is a whole different issue that may need to be addressed. But for purposes of the dust sampling, you can't figure out a contingent claim based on dust sampling, because it's either there or it's not there. So it's either a current claim or it's no claim.

MR. DIES: Your Honor's -- is perfectly correct. The EPA says that if the material is in good condition, you don't have to do anything to it. It's not a problem. The problem comes in however, Your Honor, with the type of activities that occur in these buildings that typically impact and cause these materials to release fibers. That sort of thing does not happen with regard to floor tile. But what happens in these

buildings is --

THE COURT: Well, sure it does. You can rip up the floor tile in your kitchen and stamp on it and, you know, release asbestos fibers. Of course it does.

MR. DIES: Yes, Your Honor. But EPA says that floor tile is considered not friable --

THE COURT: Right.

MR. DIES: -- unless you do those things -- that you cut it, you saw it, and you try to remove it. So that's a substantial difference because these types of materials are rendered to release fibers under a myriad conditions in the buildings such as normal maintenance and custodial activities. You don't have to saw it, you don't have to cut it.

THE COURT: Okay.

MR. DIES: You don't have to impact it.

THE COURT: The only thing that the dust sampling is going to do for you, I think, is show you that if the Debtor contests that there is asbestos contamination in the building, the dust sample will show you that in fact there are asbestos fibers in the building. That's all it's going to do. It's not going to quantify them for you. It's not going to tell you whether they're in the air. It's not going to show you whether somebody can breathe them.

MR. DIES: In a general sense, perhaps, Your Honor. But respectfully, what the dust sampling will show, Your Honor,

is if those materials have released fibers you can definitely tell if those -- if that material is in the surface dust. That can be determined very easily.

THE COURT: Sure. Okay.

MR. DIES: So you can tell the historical accumulation of dust. And here is the big issue, that the Debtor's proposal ignores. There's really two issues here. One is that this material, because of the fact that it is rendered friable in dust under all these typical conditions in the building, unlike floor tile it does create surface dust. And the fact of the surface dust is in itself an exposure hazard. Yes, it's true that asbestos has to be inhaled to cause disease, but the whole point of these cases, Your Honor, is they're property damage for present property damage. And looking at it from the standpoint of the owner, the damage is that his building environment, and his building property has been allowed to be contaminated and because of this huge body of EPA regulations and laws, that building, Your Honor, he or she must act to control that hazard -- that surface dust before it's reintrained or resuspended in the air. And there's absolutely no case in the underlying tort system that stands for the proposition that the building owner can only prove hazard by air sampling to reveal some undisclosed level of fibers.

THE COURT: I think what I already said was the surface dust can be used, as I understand it, to show that

there is contamination, but not how much. Because the test can't be replicated. Under Daubert, the fact that they can't be replicated I think means up front that they're not able to be subjected to some reliability factor. Because you can do the same test and get different results.

MR. DIES: Well, Your Honor, respectfully, we will be presenting evidence on that and I --

THE COURT: Okay.

MR. DIES: -- and I think that they are -- dust sampling is reliable under the ASTM standard. As a matter of fact, it's been repromulgated at least once, maybe twice since the Armstrong case, and Debtor's expert, Mr. Morris, is on that Committee, and it is something that is used by commercial building owners and public building owners and EPA daily and regularly outside of litigation.

THE COURT: Well, if that's the case and you've got that evidence that is clearly appropriate for a Daubert hearing. You've just convinced me even more that this is an overarching issue and we're going to do it in a Phase 1 estimation hearing.

MR. DIES: One final point, Your Honor --

THE COURT: Okay.

MR. DIES: -- and I will sit down. And that is the reason it's not an overarching issue is the way that the Debtors framed this is dust or air. But it's never dust or air

in the underlying cases because the building owner under all of the EPA regulations for these types of materials, not friable floor tile, can prove their case by other methods, and --

THE COURT: That's not the issue for me. The issue for me is what am I going to allow in as proof that there is in fact contamination that's going to cause some level of harm or some property damage, and how am I going to make that determination? That's what this hearing's going to tell me, whether you can or can't go forward on dust samples. As I said, if there had been new standards, fine, I'm not aware of them. Give them to me, give me the evidence of reliability. I'm happy to hear it. My preliminary view from reading all of this is that for the most part in the Federal system the few entities that have looked at it have concluded otherwise. I may -- I don't always follow the crowd so maybe I'll conclude that you're correct and that there is some reliability that -- factor that it's relevant to the issue at hand and that it fits. If I can conclude all that you can use it. If I don't conclude all that you can't use it. But we ought to know that going forward before the valuation hearing starts.

MR. DIES: Your Honor, I certainly don't dispute that Your Honor should, could look at the reliability of dust sampling or air sampling. I think it's, however, difficult to unhinge it from the facts of the claim, and the discovery and the evidence you would see in each claim and each building

because it really is an individual building by building determination.

THE COURT: Well, that may be a relevance issue, but it's not going to be a reliability issue. You can either replicate it or you can't. It's either accepted or it isn't. It's either -- you know, there are -- or maybe there are shades of gray, and if there are shades of gray I have to make a decision.

MR. DIES: I'm certainly not gonna try to make that argument today, Your Honor. But I know the acceptance issue is not in the rule, rule similar to a more general acceptance, but it is reliable --

THE COURT: No, but it is something that Daubert talks about, whether the testing methodology is generally accepted in the scientific community is one of the specifically enumerated factors, and it is something I'm going to want to hear about.

MR. DIES: Yes, Your Honor, and the question is is it reliable and valid, and I think we can prove that it is. But just the one more point. The reason that I don't think it's going to result in some overreaching expungement of claims is because whatever you decide with regard to dust sampling these Claimants can prove their claims by other methods as envisioned by the case law.

THE COURT: I understand. But the issue is whether

or not going forward in the valuation hearing I'm going to hear any evidence of dust sampling as a method for determining the value of claims for purposes of funding the Trust. I have a very limited focus in what I'm doing. This isn't the -- this piece isn't the Proof of Claim itself. Now, maybe the Debtor will want to take on that issue, or maybe the Claimants will, and if so then maybe I have a different relevance issue. But in figuring this as part of the estimation phase what I'm eventually trying to get to is what are the value of the claims that have to be funded? That's it. And whether dust sampling will be a methodology that I will permit to be used as evidence of what the value of those claims are to get to the funding of the Trust. That's my issue. In the estimation phase. Now, you folks disagree then, you know, tell me how you're going to rephrase the issue so that I understand it. That's what I understood the Debtor intended to do in an estimation. It seems to me that that's an overarching issue, and it ought to be addressed in that fashion.

MR. DIES: Just respectfully, Your Honor, the issue -- even when you decide dust, as we've said, and we cited the Safe Building Alliance case in our brief, what the Debtors propose to determine whether a claim exists on the basis of their sampling has been rejected by every Court that's ever heard this. So --

THE COURT: Well, I --

MR. DIES: -- that leaves you -- that leaves us with the Claimant can then come in and prove their claim and we've wasted all this time and all this effort.

THE COURT: They're going to be objecting on -- to specific claims on some other basis. If the Claimants can come in with some other method to prove a claim more power to them. Whether or not dust sampling will be permitted is still an overarching issue and Claimants ought to know whether I'm going to let them pursue that evidence. Because if not they're going to spend a lot of money on experts reports that aren't going to come in and there's no point. And if so then they should go spend that money on expert reports because that may very well be a good way for them to prove contamination. One way or another before they spend the money or don't spend the money they ought to know.

MR. DIES: Well, Your Honor, we will certainly be ready and willing and -- to convince you that this is a reliable method, and I really think that it is. When you hear it in the context of these cases and not floor tile, for which they were never any cases in the tort system, and we will take that burden on, and I think we can convince you at that time.

THE COURT: All right.

MR. DIES: Thank you.

THE COURT: Ms. Browdy, before you have to run, do you have a concluding comment?

MS. BROWDY: Thanks. First of all, again, I appreciate the Court hearing this in this order. At the Court's suggestion last time we talked to your offices and we have dates blocked out in March and we'll submit an Order on Certificate of Counsel.

THE COURT: For the Daubert hearing?

MS. BROWDY: For Daubert and then I think also the constructive notice summary judgment. We may as well tag them on to the same dates in March.

THE COURT: Oh, okay. Well, you can talk to the other counsel about that and make sure it fits. If it does that's fine.

MS. BROWDY: Thank you, Your Honor.

THE COURT: Okay. Ms. Baer.

MS. BAER: Your Honor, that takes us to agenda item #7, which is the Debtor's Motion for Proof of Claim Bar Date for asbestos personal injury claims.

THE COURT: We are not going to do that today. Call my office and get a new date unless you've got some agreement.

MS. BAER: Your Honor, we don't have an agreement, although I will say we're very anxious because we have the questionnaire deadline in January, and I know that Your Honor does not have any availability until January the hear these matters, and that creates a serious problem for us.

THE COURT: Well, then my other option is after I get

finished with every other case today I'll hear it today. But I'm going forward with the rest of the agenda first. My proposal for Grace starting next year is I'm going to do these in Pittsburgh. I think you're right that at this point in time you're going to need a significant period of time, and I think I'm not going to hold the rest up. I do have my staff, however, looking at adjusting the time frames for the other cases. So that if I can do all the other ones in the morning then I'll give Grace the whole afternoon. So I don't know quite when that's going to be. I will take care of this problem starting in January, but I can't between now and January. I just don't have the time to solve it. But so if you want to stay until the end of the day I'll hear it at the end of the day.

MS. BAER: Your Honor, we have to. I really do think we have to go forward and address it.

THE COURT: All right.

MS. BAER: The other significant matter on your agenda, Your Honor, is our Motion for an Injunction with respect to the New Jersey civil action, and we are prepared to go forward and argue that if Your Honor will hear it now.

THE COURT: I think we should just put that until the end of the day to -- well, let me see. The parties in Kaiser, what's your estimation for how long the hearing's going to take?

MR. GORDON: Greg Gordon, Your Honor. I would say probably no longer than 45 minutes.

THE COURT: Well, why don't you take a 45 minute lunch recess and come back in and I'll get as much of Grace done at that time as I can. Okay.

MS. BAER: So, Your Honor, you're proposing that we take a recess in Grace now and come back --

THE COURT: Take a recess in Grace now. However, I do have a conference call at 4 o'clock. I cannot have any cases heard between 4 and 5. You know what, that's not going to work. We'll just hear them at the end of the day. Because I have a conference call I have to take at 4.

UNIDENTIFIED SPEAKER: That clock hasn't be set back, Your Honor.

THE COURT: Oh.

MS. BAER: It's only --

(Interruption in recording)

MS. BAER: -- Grace and come back to Grace at 3 and do Kaiser now, is that what you're saying?

THE COURT: We'll do Kaiser now. We'll recess Grace until 3. Let you folks get some lunch, let Ms. Browdy go so she can catch her plane, and we'll start Grace again at -- as soon as Kaiser's finished. But at 4 o'clock I'm off the bench until -- okay.

MS. BAER: We understand, Your Honor, and we're

prepared to come back then, as long as we need to.

THE COURT: Okay, well, the other thing is I have a plan confirmation hearing in U.S. Minerals at 5. I don't think it's going to take a long time, but it is scheduled.

MS. BAER: Okay.

THE COURT: So it will be after that. Okay.

MS. BAER: Thank you.

(Recess)

THE COURT: We're back on the record in W.R. Grace.

MS. BAER: Thank you, Your Honor. We have essentially two contested matters left for the day, and before we get into either of those I'd like to just get rid of the two non-contested matters which are the last two agenda items, 11 and 12. These are the Debtor's Orders with respect to its Fifth Omnibus Objection and its Eleventh Omnibus Objection. Your Honor, with respect to the Fifth Omnibus Objection, I have a Continuance Order continuing what are essentially the last two contested items on there, and I'd like to hand that up.

THE COURT: All right. You can do them both at the same time, please. Thank you. And 12?

MS. BAER: Your Honor, with respect to agenda item #12, the only thing left on there was the National Union claims, and the stipulation, which I handed up, is also an Order, and that resolves the National Union claims. It's just duplicate claims. There are still National Union claims of

record. This resolves the duplicates and resolves the rest of that Omnibus Objection, and it will no longer be on your call.

THE COURT: All right, one second. Okay, those Orders are entered.

MS. BAER: Thank you, Your Honor. That takes us back to agenda item #7, which is the Debtor's request for a personal injury Proof of Claim bar date. And I'm going to turn that over to Barb Harding.

MS. HARDING: Good afternoon, Your Honor.

THE COURT: Good afternoon.

THE COURT: Barbara Harding on behalf of W.R. Grace. Your Honor, as you know we have filed a Motion for a Proof of Claim Form, and by way of a preliminary statement, Your Honor, I do want to just talk briefly about the Proof of Claim. It's a fundamental feature of bankruptcy, obviously, as the Court knows, and there can be no doubt about the Court's authority and power to issue an order, a bar date in this asbestos bankruptcy proceeding at this time and for these -- this small and limited class of Claimants.

The only question I think that's before the Court is why should the Court do that at this time and how should the Court go about doing it? And before getting to those two questions I do want to raise one preliminary matter, which relates to the burden involved with this motion. What party, or what parties have the burden of demonstrating to the Court why or why not?

Why should this bar date be issued or why the bar date shouldn't be issued. And I just want to call the Court's attention to a couple of statements.

If you could -- could you turn on the screen please? Thank you. Before it comes up, Your Honor, obviously the rule with respect to the Proof of Claim says shall, and with respect to the bar date it says shall as well. And without getting into whether it has to be ordered I think that there has been in the cases established that the burden is on the objectors to the bar date to prove, to make a persuasive showing to the Court as to why a bar date should not be issued. And I wanted to show the Court, and actually I think I could bring up to the Court the slides if we can't get it on the screen.

THE COURT: Okay, thank you.

(Pause in proceedings)

MS. HARDING: We tested it before, Your Honor, and it worked. I apologize. But I will read the quote from Eagle Pitcher. "We consider that this rule, 303(c)(3), sets up something in the nature of a presumption that a bar date will be set. But as is the case with the presumption it may be overcome by a persuasive showing. We reached the conclusion that a bar date for the filing of Proofs of Claim should be set for present asbestos Claimants for insufficient reason has been shown not to do so."

So with respect to the motion that we've made, Your Honor,

we submit that it is the objector's burden to demonstrate that the bar date should not issue. It's their burden to demonstrate persuasively that the reason for which it's sought is not legitimate, and that the purpose for which it is sought can't be served by issuing the bar date. So I think that's an important -- the burden is an important thing to consider in this context.

Now, let's talk about why the bar date should issue. The Court has made -- and the parties, the Debtors and all the parties have made substantial progress over the past year, coming up with a structure for dealing with asbestos personal injury claims. The Court has put in place many pieces to make sure that there is a structure in place for dealing with these claims and that there is a process by which those claims can be valued, the liability of the Debtor can be determined for those claims. And there are several pieces in place. The Court has determined that there will be estimation, and that's how we'll go about it. There's now a CMO that, you know, took considerable time went into negotiating that CMO. There's a focus on the current pre-petition Claimants determining that the Debtor's liability for those claims so that we can then predict the liability for future claims. The Court has ordered a questionnaire to be issued on, you know, over 100,000 Claimants. The Debtor's claims agent -- they've served that questionnaire out on over 100,000 Claimants. We've got this

process in place and it's moving along. We're making progress.

And the reason that we've made the motion for the bar date is to make sure now that there is -- that the last piece is in place, that the Court has the authority to make sure that the process and structure that it's put in place works. The very narrow reason, and I think we've been very transparent about it, the reason we think we need the bar date is to that the Court has jurisdiction over the Claimants, the pre-petition litigation Claimants, to make sure that they return the questionnaire, and that if they don't return the questionnaire that the Court has the authority to issue some kind of sanction to compel them to do so. And right now there's no process in place to insure that that can take place. And I have not seen anything in any of the objector's pleadings -- they have not argued about this issue. They do not dispute that that -- that the Court's authority is not there on this issue. And so I don't -- they haven't even argued it. And so I think it's a very important point.

Now, I was not involved in this case back in January when this was -- there was a hearing where this issue came up. And at that time the Court said, as I understand, I read it all again last night, the Court said, "I don't think I have to issue a bar date at this time." And I think the Court said, "We're in estimation, I'm going to order this questionnaire, I don't think we need the bar date at this

time." And at that time Mr. Bernick raised this very issue. He said, "I don't think the issue of the bar date goes to the question of necessarily assessing liability, although it can help with that." He said these very words. AWe need to have a way to have process over the Claimants.@ And at that time I think it's very important -- I wrote it down last night. At that time Your Honor said to Mr. Bernick, Your Honor said, "Well, I think we can deal with that." And you said two things that I think are very important. First you said, "It seems to me that the attorneys -- that if the attorneys are willing to go back to their clients and file something that says my client understands that there's going to be an estimation hearing and that they will be bound maybe I don't need a bar date." Now, as far as I know that's never occurred.

The second thing that the Court said was that I've got gazillions of 2019s and maybe -- and I can't get process over the Claimants but maybe I can get it over the lawyers. And so that's where it was really left, with this idea that there might be this other mechanism for having process over the Claimants. And that was the context in which the questionnaire was negotiated and the context in which Mr. Bernick made the statement in the July hearing. We had originally had a questionnaire that had on it, in the front of it it said Proof of Claim/questionnaire.

And so when Mr. Bernick said we're not seeking a Proof of

Claim, we're not seeking a bar date it was in connection with the questionnaire, which we are not. We are not seeking to make the questionnaire a Proof of Claim form or a bar date. We're simply saying that there's nothing in place right now for the Court to have jurisdiction over these Claimants. And I don't see anything coming from the other side suggesting that that's not true. And so the only thing that I see in their pleadings arguing for why there should not be a bar date I think are simply, one, not relevant to purpose for which it's being requested, and two, I think they've been soundly rejected in the past. First -- the first issue, if you can turn, Your Honor -- and actually, before we get there Your Honor, if you -- does the Court disagree or want more argument on the issue of jurisdiction --

THE COURT: No.

MS. HARDING: -- in the 2019? Okay. With respect to the question of -- the fact that other cases have not issued bar dates, other asbestos cases have not issued bar dates, I did actually prepare -- the objectors make a big deal about, well, they do this all the time without bar dates, but there's a couple of, I think, very important distinctions, and I think it actually gets back to something Mr. Bernick said all along. You have to view each individual asbestos case in the context with which the issues arise. And it's different in every case.

And so I note for Your Honor two main things with respect

to the other cases where bar dates either have or haven't been issued. Well, first of all, they have been issued in the context of the case where estimation is going on. In Babcock & Wilcox and in Eagle Pitcher, in both of those cases estimation occurred and there was a bar date with respect to asbestos PI claims. So in connection with the other cases that were listed by the objectors as reasons why a bar date shouldn't issue here there are two important distinctions. One, as far as the Debtors can tell, in those cases the Debtors didn't request a bar date. There are a couple places where I think in -- I'm not sure, in Owens Corning, I think, another party requested a bar date, but the Debtors didn't request a bar date. And I think if Your Honor will look at slide #6 from the Eagle Pitcher case, Your Honor, the Court in that case made a very important statement, and I'm gonna read it because it's not in front of Your Honor. So, "Initially we deal with the contention of the Debtors that they have an absolute right to have a bar date set by which time Proofs of Claim must be filed. After careful consideration of this question we have reached the conclusion that while such bar dates are commonly set upon good cause shown the Court may dispense with one in any given case.@ Again, upon good cause shown. "In reaching this conclusion we are not aided" -- I think it's very important -- "not aided by the information communicated to the Committee that in none of the other cases, asbestos cases,

which are known has a bar date been set for there is no indication in any of the decisions in those cases that where no bar date was set that the Debtor which was involved desired that there be one." I think that's an important distinction with respect to this matter.

Secondly, in none of those cases, I think I can say unequivocally was there a discovery questionnaire that the Court had issued and had required that the pre-petition litigation Claimants return. And so this issue of the Court's jurisdiction over the claim it just simply wasn't present in any of those other cases, or quite frankly, in any other asbestos bankruptcy case, I don't think. And so I think that's another important distinction to make.

The next point I want to make, Your Honor, I think it goes to the fundamental objection that the objectors have to the bar date, which is they say it doesn't get to finality. It doesn't real help us with finality, and they say it's the primary purpose of a bar date is finality. And I can't find anywhere in the case law that says that the Debtors have to show that it's the primary reason for issuing the bar date.

One, we disagreed with the idea that it's not -- it doesn't help serve the purpose of finality. We think it does, and I have some quotes here from prior cases, Your Honor, where I think that that idea that it doesn't help get to finality is not true. But importantly, it doesn't -- it still doesn't get

to the fact that the reason that the Debtors are asking for the bar date in this case is more fundamentally about jurisdiction, and I think we quoted, Your Honor -- I don't have a slide, but I have the quote here from the IN RE: Hooker case, Your Honor, where the Court stated, "Filing a Proof of Claim is not merely a means of providing information to the Bankruptcy Court but as a means of involving the Bankruptcy Court's equitable jurisdiction over the bankruptcy Estate to establish the Creditors rights to participate in the distribution of the Estate." The idea that the bar date is important for jurisdiction I think is it's established, it's certainly a legitimate purpose for seeking a bar date, and I think that the objectors have the burden of demonstrating why it shouldn't be issued to serve that purpose in the context of this bankruptcy.

And finally, Your Honor, with respect to the finality argument, I think the two statements from IN RE: Eagle Pitcher and from Babcock are very important. And I am going to go ahead and read them, Your Honor, because I think it's important to focus on them. With respect to slide 7, it says in IN RE: Eagle Pitcher, "Only two of the grounds urged by the Committee against the setting of a bar date warrant more than a cursory comment. The first of these that the setting of a bar date will not serve the purpose that a bar date usually does in a Chapter 11 case of assuring finality and affixing the universe of liability is not persuasive. There is no question that the

setting of a date by which a claim must be filed, the procedure employed in virtually all bankruptcy cases, does help fix the universe of Claimants to be faced by a Debtor." That's true of this. With respect to our pre-petition litigation Claimants it will help us understand precisely who among that universe of Claimants intends to pursue a claim against the Trust. And I'm happy to address the question of whether we really know who those people are or not.

But I think the objector's own pleadings demonstrate that we don't because they've said that we -- they make a statement, an unqualified statement, there are lots of people that haven't received their questionnaires that should. Well, the Debtor's sending out to everybody in their data base that we think had a pre-petition litigation claim. And we sent correspondence requesting information about those Claimants. We haven't received a response back, but that surely is one indication that we don't necessarily know the universe of these Claimants.

Secondly, Your Honor, the objectors have made a couple of statements over the course of the past several months that I think is simply not true. When we bring up this issue and we say how are the experts gonna treat these people that don't respond? They say, "Well, if they filed a claim before they're gonna file a claim against the Trust." That -- I mean, the PD experience demonstrates that it's not necessarily true, and Your Honor, local counsel for Grace received a call on Friday

from counsel in Mississippi stating that they wanted to figure out how they could withdraw their claims from the personal injury context. Three thousand of them. So we have a problem of identifying this universe of Claimants, and the bar date will help us to set that universe, and then there's no doubt that that helps us with respect to finality in this proceeding.

Secondly, while -- back to Eagle Pitcher. "While the Committee is perfectly correct that ascertainment of the total number of Claimants in and of itself will not yield a value of present asbestos claims, nevertheless, it is manifest that fixing the number and identity of such Claimants will lend considerable assistance to the process of arriving at a value of the claims of this class." It will absolutely help us determine the value of the claims of this class, the pre-petition litigation Claimants. Which is very important, obviously, as the Court has recognized, for helping us to assess future claims.

So -- and finally, Your Honor, the Babcock & Wilcox decision, I think, is very informative for the issue before the Court. In that case another quote, "This Court does not find that the prospect of establishing a section 524(g) Trust justifies relieving present Claimants from asserting their claims before a bar date.@ That's the main argument raised in the objections. That we're gonna have a Trust we don't need a bar date, and the Court resoundly rejected that argument and

gave three reasons. AAscertaining the number and identity of present Claimants will assist in valuing the claims in this class by facilitating the claims allowance and estimation process," including estimation right there. "This in turn will assist the parties in the negotiation and formulation of a viable reorganization plan, and third, moreover, although future Claimants are not governed by a bar date an identification of the number and nature of present asbestos related claims will help to predict the Debtor's future claims liability, which is necessary for determining the size and structure of the Trust."

So Your Honor, we think that there is absolutely no reason not to issue a bar date here. It serves several very legitimate purposes, and it's the objector's burden to make a persuasive showing as to why it should not issue. So, thank you, Your Honor.

MR. PASQUALE: Good afternoon, Your Honor, Ken Pasquale for the Official Committee. Just wanted to mention, we do support the Debtor's motion. Ms. Harding mentioned some comments the Court made in January. In fact, those comments were made in response to my partner Mr. Kreuger=s comments to the Court about the need for a bar date, mentioning the fact, of course, that not only did our constituency fill out Proof of Claim forms, but of course the property damage Claimants did, and they were quite detailed. I'm not gonna belabor those

arguments again now, but we do think when the Court said there might be a time later this seems to be the time, at least for this limited subset, in light of the fact that the information simply isn't there in the 2019 filings.

Putting aside whether they should be or shouldn't be at this point, the fact is they're not. So I think the Debtor's motion should be granted. Thank you.

MR. LOCKWOOD: Your Honor, this is a really remarkable performance. Normally parties seeking discovery do so because they have a case that they're litigating with somebody, and the discovery is the aid of litigating the case. Here the Debtors have no case against anybody, because the claims haven't been filed, but they want to take discovery. So how do they solve their problem? Well, they say, "We'll get the Court to order these people to file cases which will then give us jurisdiction to get the discovery we need." On the face of it that's got it backward, but the other thing is what the Debtor never addresses here, in particular in connection with its Power Point charts and the rest, is what actually is the purpose of a bar date in a Bankruptcy Court, and what are the consequences of filing one?

They want -- number one, first they're not asking for a bar date for an entire universe of claims. They're just not. They're not asking for a bar date against anybody who either didn't happen to file a lawsuit prior to the petition date but

nevertheless had become sick and just hadn't filed the lawsuit, nor are they asking for a bar date for the 42 years worth of people that have gotten sick since June of 2001 when they filed their petition and would have filed claims against Grace if they hadn't be subject to the automatic stay. So they're clearly not asking for the entire universe, they're just saying they are. And moreover, the entire universe actually includes the future Claimants, who they couldn't get a bar date against even if they wanted to.

Secondly, they say they don't want to do anything with respect to individual claims. They say they want to do a 524(g) plan. As the Court is well aware, in a 524(g) plan you set up a Trust, the Trust resolves all the claims. So by hypothesis, if you're going to elect the 524(g) route there's absolutely no purpose to be served in setting a bar date to force people to file claims in the Bankruptcy Court, which by hypothesis is for the purpose of allowing the Bankruptcy Court to determine whether a claim should be allowed or disallowed. But they're not doing that here. And most of the cases they cite about bar dates are not 524(g) cases. They're cases in which one way or another the Bankruptcy Court believed it was gonna have to resolved the individual claims.

Now, they have cited two cases as authority for the proposition where you would have a bar date. Babcock & Wilcox and Eagle Pitcher. In Eagle Pitcher, although the Court did

have a bar date, there's absolutely nothing in the reported decisions of that case or that the Debtor has ever brought to this Court's attention that suggests that the bar date ever produced anything that was used in the estimation to any useful purpose. And there certainly -- in the discussion of the contested estimation that did occur it was done on the basis of the settlement history of the Debtor. It was not done on the basis of dragging some experts in in some undisclosed manner who are gonna tell the Court which of the pending claims are valid and which aren't, which is the Debtor's posture here.

They still haven't told us how the experts are gonna do it, but they keep saying, trust us Judge, trust us Judge, we need this information because our experts are gonna take it, and our experts are gonna tell you how these 150,000 claims should be sliced and diced in terms of their validity and their value. And Babcock & Wilcox, which the Kirkland & Ellis firm was the -- the firm that got the Debtor to make the motion for a bar date and it was granted. What happened? They did in fact persuade Judge Vance that they should have a bar date, and they did it for the purpose of saying that they wanted claims allowed and disallowed. They were gonna have Rule 42 consolidated trials. They were gonna have Summary Judgment Motions. Had nothing to do with estimation.

And when -- after the bar date was passed and 240,000 claims came in they were then in front of Judge Vance and Judge

Vance was asking, "Well, okay, now that I've got 240,000 claims what do you expect me to do with them?" And the transcript recites Mr. Bernick attempting to explain to Judge Vance about how she was gonna do Summary Judgment Motions and for groups of cases, and consolidated joint trials, and these were all gonna be done in big groups. They weren't gonna be done one by one because Judge Vance said, "I'm not young enough to do 240,000 claims." And eventually Judge Vance said, "Well, you haven't convinced me, but go off and brief it, and explain to me how this process is gonna work." And the next thing we knew we had a consensual plan. So it was never used in Babcock & Wilcox either.

So now we're back to this case, and the Debtors are correct. There's never been a case in which any Court ever ordered 150,000 people to fill out questionnaires of the length and breath that this Court has argued in this case. So, they're right. This is a unique case. But they're boot strapping themselves. Having gotten the Court to order a questionnaire which the Court justified on the grounds of giving them discovery on an estimation which was supposed to be for aggregate purposes, not individual claims allowance. They're now here saying, "We want a bar date."

Okay, supposing the Court gives them the bar date. What happens? Hundred fifty thousand people file claims. First, the notion that the questionnaire isn't really the Proof of

Claim form is sort of ridiculous because the two-page Proof of Claim form that they give as an alternative, if somebody files that and doesn't answer the questionnaire you know and I know, and that's what this whole jurisdictional stuff is about, that they'll come in and say, "Well, Judge, they didn't file the questionnaire, so even though they filed the Proof of Claim their claim should be disallowed as a discovery sanction." That's their first point.

The second point is what happens in a bankruptcy case when somebody files a Proof of Claim? They're only required to file it if they want the claim allowed. But once they file it is it prima facie valid. The Debtor then, if it doesn't -- if it wants to contest it has to file an objection to it. And the Debtor in this jurisdiction, and in no jurisdiction could file an objection that says -- a global objection says they filed 150,000 claims, we object to all of them. Which means that therefore in theory unless they go through them one at a time they're all gonna be allowed.

But the Debtor says, "No, no, no, no. We're not gonna do that. We're gonna estimate it." Well, what do you mean you're gonna estimate it? Section 502(c) of the Code provide for the estimation in lieu of a 502(a) allowance. But 502(c) talks about estimating the claim for purposes of allowance, and that means that if you're gonna estimate claims rather than go through the full litigation you still have to estimate them one

by one, and when you come in and you say I want to estimate your claim, Mr. Claimant, that initiates a contested matter, which gives the Claimant the full panoply of discovery and due process rights. What happens then? Well, if you're estimating a personal injury claim for purposes of distribution, say 28 U.S.C. section 157(b)(2)(b) says the Bankruptcy Court can't do that. Only the District Court can do that. It's not a core matter.

THE COURT: But it doesn't mean I can't do it.

MR. LOCKWOOD: Well, you could --

THE COURT: For estimation purposes I can do it. I just can't do it as a core matter without making proposed findings of fact --

MR. LOCKWOOD: Right.

THE COURT: -- or the party's consent.

MR. LOCKWOOD: You would have to make recommendations under Rule 9033.

THE COURT: But I could certainly --

MR. LOCKWOOD: You could --

THE COURT: That's right. But I can do it.

MR. LOCKWOOD: -- do it. But you wouldn't have the final word.

THE COURT: Exactly.

MR. LOCKWOOD: Instead they'd all go up to the District Court, which would have de novo review under 9033.

THE COURT: Unless the parties had good sense and consented to the entry of a Final Order in the Bankruptcy Court.

MR. LOCKWOOD: Well, maybe, but that's 150,000 individual estimations, and moreover, in the District Court there's -- you run into 28 U.S.C. section 1411 that says you're entitled to a jury trial, and all of these things --

THE COURT: I don't know about on the estimation issue.

MR. LOCKWOOD: Well --

THE COURT: On the allowance issue -- you see, that's the problem. I think there is a big difference between estimation and allowance. Estimation of a personal injury matter probably isn't core simply because the ultimate allowance of the claim is removed from Bankruptcy Court jurisdiction, but the estimation purpose is not to allow the claim itself, it's to figure out for distribution and confirmation, I should say, issues what the likely universe of claims will be and what the value is. It's a different purpose from the analysis of the claim itself.

MR. LOCKWOOD: That's why 157(b)(2)(b) distinguishes estimation for purposes of feasibility, which is a core matter and which is done on an aggregate basis, from estimation for individual claims for distribution purposes, which -- why does the statute say the District Court has to do that? And it's

because estimation for -- of a tort claim is considered to be the functional equivalent of resolving the tort claim, and if you're gonna resolve the tort claim you have to do it in front of a jury to get the value out of it.

But in any event, we're not here today to debate whether that is or isn't. What I'm -- the point I'm trying to make is that when you set a bar date you set in motion a process. And that process is the resolution of those individual claims. And this Debtor doesn't intend, it says, to set in motion that process. It's gonna have what I would call a bogus bar date. It's gonna set a bar date, and then the minute the claims come in it's gonna say, "Stop, go no further. We're not actually gonna use the mechanisms that a bar date is put in the Code and the Rules to work with, namely claims allowance and disallowance. Instead we're gonna just leave it there forever and it's solely gonna be for the purpose of allowing the Court to disallow claims for -- as discovery sanctions if they don't fill out a questionnaire.@ And Ms. Harding said, "Well, I never heard of anybody challenging the Court's power to do something like this." Well that's because nobody's ever asked the Court to do anything like this before.

They haven't cited any case where a bar date was proposed to be set for purposes of setting up discovery sanctions on people who aren't even parties. We start out again with the aggregate estimation. These Claimants are not parties unless

they choose to be parties in that case, and while the Debtors -- basically the Debtors sort of want to commandeer them into that role, and with all due respect, we think that that is inappropriate and is inconsistent, and is gonna give rise to a lot of problems down the road because if I were a Claimant and the Debtor forced me to file a claim, and the Debtor didn't object to my claim and didn't get it disallowed my position would be, is my claims allowed? And what's gonna -- what happens then?

THE COURT: Well, I think if I have a bar date that requires people to file claims and there's no objection to it the claims are allowed.

MR. LOCKWOOD: And furthermore, they can't make an objection by saying I object to 150,000 claims on some piece of paper that Mr. Bernick and his troops are gonna draft and file here.

THE COURT: But that still doesn't set the value issue. You know, there -- look, the bottom line for the Debtor, and for probably all the experts, really is to try to get a grip on not just the number of claims that are going to be filed against the Estate, but what level of asbestos disease, if any, people are claiming. And --

MR. LOCKWOOD: I understand that, Your Honor. And the irony of all of this is that the Debtor's experts and our experts are able to do that probably better without looking at

the pending claims than they would with looking at the pending claims, because number one, they've got the history, and number two, they've got -- they're all gonna be making predictions about what the impact of the new laws are in the states, for example, where you can't file nonmalignant claims unless you meet very rigid medical and exposure requirements and things of that nature, and it's gonna be -- it's not gonna get involved in going through claim by claim 150,000 claims and having some expert put -- make piles, here's a good claim, here's a bad claim, here's a medium claim, and come into Court and say, "I've reviewed 150,000 claims." It's just not gonna happen.

And moreover, as I said earlier, it's incomplete because they're not estimating the 42 years of claims that are -- that have accrued since then through this method. They're gonna have to estimate them some other way. What is the other way gonna be? It's gonna be their experts are gonna make predictions about where those claims -- they're either gonna predict on the basis of history, they're gonna predict on the basis of some selected number of the pending claims that they've reviewed as part of the questionnaire process, they're gonna use the Manville Trust experience because Manville gets all the claims. I don't know what they're gonna use. They haven't told us. But the idea that somehow or another subjecting the claims -- the subset of claims that was filed in a Court, which they say in their first brief that -- on page

10, oh, we know what they are, and now Ms. Harding here today says, "Oh, no, what we don't know what we are because we're getting lawyers who are telling us you didn't send me enough questionnaires because I have more claims than you think I have." Or, "You did send me a questionnaire but I didn't really -- I don't really have that case." Or, "I don't know whether the Plaintiff is the same," or whatever. I don't know at the end of the day whether they'll ever sort that out or not, but the fact is Your Honor put her finger on it at the very first time this was argued, which is, no matter how they slice and dice the 150,000 claims, and no matter how big a subset it may be it's still a sample. Because they're gonna be extrapolating hundreds of thousands of future claims from it, and they're gonna be extrapolating the unfiled present cases from it. So it's still gonna be a sample. It's not gonna be a universe. And who -- where have we seen any expert affidavit or anything that says, "Gee, Judge, if the questionnaires only came back with 75,000 claims I couldn't estimate what the -- do my estimation job properly, because I have to have 100% return on 150,000 claims."

She said -- they argue that there's gonna be bias. Well, I mean, maybe yeah, maybe no. I guess you'd have to look at the 75,000 claims before you could really determine whether there was bias or not. You'd need to know why some -- why the 75,000 questionnaires that weren't answered or the claims that

weren't filed, why they weren't filed. Maybe they'd be representatives of the ones that were filed. Maybe they'd be unrepresentative. Is the -- how is the Debtor's expert -- the Debtor's expert, I suggest to you, is gonna take the position that every claim that does -- every questionnaire that doesn't get answered, and/or every claim that doesn't get filed is because, a) it's an invalid claim, b) they'll derive percentages from the non-filers from the universe, supposedly. So if a third, let's say, or in my hypothetical, if half of the them didn't respond to the questionnaires, the Debtors argue, that shows half of all our future liability is already -- should be gone, because those people have basically admitted they have no claims by failing to file the questionnaire. And now we'll look at the remaining 75,000 and our experts will tell you how to further reduce the validity and amount of those claims.

And again, none of this has anything to do with a bar date. And it certainly doesn't answer the problem that you're gonna create if you wind up having people with entitlements to have their claims allowed because they filed them and no process for objecting to them. If the Debtors were really serious about this proposal, Your Honor, they would do what they tried to do, or said they were gonna do in B&W, which is they would say, "Okay, we'll step up to the plate. We'll admit what we're really doing here is individual claims analysis,

evaluation, and disallowance, and we'll go through the process, and we'll try and explain to Judge Fitzgerald, and to Judge Cotty, or whoever the District Court Judge here turns out to be, we'll explain how we're gonna do that for 150,000 cases, and then where that's gonna take us for the other cases that haven't yet been filed and the futures. But they're not doing that. They're just presenting this whole thing as a discovery mechanism on their part, and that is not an appropriate use of a bar date, and no Court has ever held it was. Thank you.

THE COURT: Okay. I'm sorry but I told you I had a conference call at 4 o'clock. I do. So I'm going to take my conference call. You've got -- at your discretion you can try to stick around if you want and see if I get done before 5 o'clock. I have my doubts. Or else I will reconvene this after the U.S. Minerals plan confirmation hearing, which starts at 5 and will end when it ends. As far as I know, most of the issues have been resolved, so I don't expect it to be too lengthy. We'll be in recess.

(Recess)

THE COURT: All right. We're back on the record in WR Grace now. Thank you. Mr. Esserman?

MR. ESSERMAN: Yes, Your Honor, Sandy Esserman on behalf of Baron & Budd, ELG, Peter Angelos, Reaud, Morgan & Quinn, & Silber Pearlman. I'm gonna be very brief. I think Mr. Lockwood made many of the arguments. I would point the

Court to a couple of things.

One is the purported reasons for this Proof of Claim put for the Debtor in their own motion. They had five bullet points that I think are sort of instructive. The first bullet point is why they need a Proof of Claim with the Reaud, Morgan & Quinn firm disputed the Debtor's definition of what constitutes an unresolved claim. Filed an objection to complete the PI questionnaire on behalf of those claimants who settled, but unpaid or partially paid claim. That's no longer a reason and you've already ruled on that. And they know all of the information about those claims. They've got records.

The second bullet point out of five was despite having filed the Rule 2019 Statement in the case, it appears that Reaud, Morgan & Quinn's Rule 2019 Statement may be incomplete. Once again, they discovered 50 claims that were filed in the Silicam DL that did not appear on Reaud, Morgan's 2019. Well, Reaud, Morgan doesn't represent those people. We've been through this once before. That's reason number two out of five as to why we need a bar date. I would contend that none of those are reasons.

Further, law firms have denied that they presently represented, or in some cases ever represented claimants and the Debtor's records indicate they are counsel of record. That's always gonna be the case. People -- whenever you're dealing in a mass tort with 100,000 claimants, clients are

gonna fire their lawyers, they're gonna change lawyers, that's just a fact of life, bar date or not. Law firms have been requesting extra questionnaires. I don't know what that has to do with a bar date. And then law firms have been requesting lists of Social Security Numbers of claimants where they received PI questionnaires for purposes of cross-referencing their list of PI claimants. Once again, I'm not so sure that necessitates a bar date.

So I think the reasons why this bar date has been requested just don't support the institution of a bar date. I'm gonna reserve my argument on due process issues. I don't really want to get into it right now and the due process issue should -- sort of an alternative argument. I certainly don't want to be in a position of waiving that argument. I don't want to have to make it now until it appears that we need one, but need to have such an argument, but the Debtors have proposed a January, I can't remember the date, 15, 17, 12th, some date in January for the return date for a bar date and this -- that just does not even come close to complying with due process. In cases where we've have bar dates, we've had extensive notice proceedings. We've had advertising. We've had newspaper advertising. Sometimes you'll have TV advertising and it's sometimes a year process, eight-month process to get all of that done and, in fact, the Kirkland firm is very familiar with cases that have had bar dates, Dow-

Corning, you know, these -- the notice has been extensive and certainly would go well into 2006. I'm not sure that that's really what is -- what would serve any purpose at all. But those are my major points, Your Honor, and I reserve the right should we get into the due process issue. This is sort of a highlight of the argument.

THE COURT: All right. Good afternoon.

MR. WYRON: Good afternoon, Your Honor, Richard Wyron for David Austin, the Futures Claimants rep. I join in the comments Mr. Lockwood made and won't repeat them. I raised just one other point. One other rationale offered by the Debtor was we needed a bar date to establish jurisdiction. That certainly can't be the case for estimation on an aggregate basis, as opposed to an individual claim basis. It was most recently done in Owens Corning where there was no bar date and yet the District Court did an aggregate estimation. It certainly is possible to do. Our concern is one of distraction. There are an awful lot of issues associated with the bar date. It reminds of a question Your Honor posed earlier in the day to Mr. Baena, which was if you're doing a individual claim objection on PD, why have an estimation? This is the flip side. We're doing an estimation. We're going to have to do an estimation of unsettled present claims, unlitigated present claims, and future claims anyway, but why do a bar date and tap into an objection process? Our concern is that it will

become a side show. It will become a delaying process. It will take an awful lot of Court time and futures rep interest is getting this case moving forward, so perhaps one day we can stand here like the case you just heard and have a consensual confirmation. And if we detour to bar dates, and fights over due process, and the like, and the lengthy additional time periods, I fear we move that goal further away, rather than closer. And for that reason, we oppose the Debtor's Motion, Your Honor. Thank you.

THE COURT: All right. Mr. Becker.

MR. BECKER: Good evening, Your Honor, Gary Becker, Kramer, Levin, Naftalis & Frankel for the Equity Committee. Your Honor, something I would just mention. I hadn't originally intended to speak, but something that was just mentioned struck me. Your Honor, as the holder of the residual interest in this estate, we are entitled by virtue of 1129(a)(7) to ensure that the payment waterfall of 725(a) is followed and when you look at Section 725(a) it talks about after the 507 claims to payment of allowed unsecured claims that are timely filed or tardily filed. It doesn't talk about claims that are not filed and, in fact, as we know, under the law Mr. Lockwood's clients, if they aren't scheduled as claims and they haven't filed a Proof of Claim, they don't have a claim.

THE COURT: But, wait. No. I don't think that 1129

and 524 operate in that fashion.

MR. BECKER: No, it's 725, Your Honor.

THE COURT: 725?

MR. BECKER: 725.

THE COURT: I don't think that 725 and 524 operate in that fashion. The whole purpose for setting up the trust is to figure out a mechanism outside the bankruptcy process by which tort -- the asbestos personal injury claims, specifically, can be adjudicated. There isn't a need, I think, for filing Proofs of Claim in bankruptcy. I agree with the Debtor that there are cases in which it's appropriate. I agree with the Debtor that it's the people who oppose it who have a burden to show why it shouldn't be done when a Party-In-Interest has filed an appropriate motion, but that's what we're here for. I don't think that that 524 can be just excised out of the Code and you can say that 725 applies in that instance with respect to the distribution on allowed claims.

MR. BECKER: Your Honor --

THE COURT: That's the whole purpose for a trust.

MR. BECKER: I think I know where you are on that and I don't think it's inconsistent, Your Honor. That there are a number of cases, aside from asbestos cases, there are a number of cases where there's a claims bar date and there are a lot of claims. They come in. Nothing's done with them. At the confirmation of the plan they're handed off to a post

confirmation trust, which objects to the claims, pays the claims, whatever. That is analogous -- directly analogous to the situation here. We can have a bar date, have those claims transferred to the personal injury --

THE COURT: Mr. Becker, what are we going to do with a bar date?

MR. BECKER: -- or property damage costs --

THE COURT: You know, if a bar date makes sense at all in this case, it seems to me to make sense when we're sending out for votes on a confirmation of a plan and we can treat, at that point, the ballot as a Proof of Claim. I really don't see what we're getting at by attempting, at this stage, to create a bar date. We can't even get through the property damage issues in this case in any kind of recognized orders. The Debtor hasn't been able to get its Constituent Creditors to agree on a process for litigating those claims yet and we've 1100 and some of those still to go. What are we going to do with 150,000 more claims that the Debtor can't get people to agree on the litigation mode for?

MR. BECKER: I don't propose to litigate them, Your Honor.

THE COURT: Well --

MR. BECKER: What I --

MR. BECKER: -- if you filed Proofs of Claims, believe me, you're going to litigate.

MR. BECKER: It is not inconsistent to have filed Proofs of Claims and have estimation process.

THE COURT: You don't need a Proof of Claim to estimate. The whole process of a Proof of Claim is for the Debtor or some other Party-In-Interest to substantiate that that specific claim is either allowed or disallowed in the bankruptcy process. For estimation, if you're looking at an aggregate, you don't need a Proof of Claim for that function.

MR. BECKER: But we --

THE COURT: The reason I permitted the questionnaires was to try to get the -- what the Debtor said the Debtor needed for its experts to evaluate in terms of the current mass of claims and it was only ever supposed to be a sample. Nobody ever expected that every claimant was going to answer that questionnaire, at least I certainly didn't. Just like probably not ever claimant's going to file a Proof of Claim. There will be entities that will miss bar dates. It happens all of the time. There will be entities that don't respond to the questionnaire.

MR. BECKER: That is -- and that is the problem, Your Honor.

THE COURT: Well, it's not a problem.

MR. BECKER: We need a data source. I'm sorry, Your Honor.

THE COURT: I don't understand what the Debtor needs

by way of a data source. The Debtor has been litigating these claims for 30 years.

MR. BECKER: But suppose, Your Honor, there are 118,000 of these identified claimants and only, pick a number, 10,000 of them file the personal injury questionnaire? What do you assume about the other 100,000 people?

THE COURT: That they weren't interested in answering the questionnaire.

MR. BECKER: And for purposes of estimation, you assume they have zero claim? Do you assume they are like the 10,000 who filed?

THE COURT: I don't know that even getting the questionnaire answered is going to give you the information that you need to analyze the estimation issues on all fours. Hopefully it will go to be some track to verify, or to justify whatever appropriate spin you want to put on that word, what the experts are saying with respect to their numbers. That's the use that's going to be most appropriate of that questionnaire, not to set the sample upon which the whole estimation process is going to go forward.

MR. BECKER: Your Honor, if it were the Court's rule that you could assume, or the experts could assume, for purposes of making that estimation, that the claims -- the PI questionnaires that were not filed represented a zero claim when you calculate the numbers --

THE COURT: You can't make that assumption.

MR. BECKER: Well, then you have --

THE COURT: You can't make that --

MR. BECKER: -- to figure out how to force them to file.

THE COURT: No. I don't have to make that decision. I agree with the Debtor that some limit -- some appropriate discovery to the extent that people want to submit to discovery and agree to provide the information is appropriate and that -- that's it. I think the Debtor is entitled to take some discovery. It's entitled to know, for example, what its assets and what its liabilities are. It could use 2004 depositions with respect to that, if it chose. That's all this questionnaire is.

MR. BECKER: And that would be woefully inefficient to use to use 2004 --

THE COURT: Well --

MR. BECKER: -- depositions.

THE COURT: I think the whole questionnaire process is probably woefully inefficient, but it's what the Debtor wants to do and the Debtor controls its discovery. I don't. So it's fine with me. If that's the way they want to go, it's the way they want to go.

MS. HARDING: Your Honor, may I be heard? Your Honor -- Your Honor, I think it's very, very important to get back to

what I said at the very beginning of the hearing, because I think that all of this is a big red herring and it served exactly the purpose that the Objectors hoped that it would. The Objectors have the burden here of demonstrating that the bar date shouldn't issue. There is a presumption that it's legitimate and that it serves a useful purpose in --

THE COURT: Fine.

MS. HARDING: -- any bankruptcy, including estimation.

THE COURT: Set a bar date for the proof -- for the balloting. If you want a bar date, we'll say if you don't submit a ballot as a current claimant, you don't have one, period. Then you can't file a claim against the trust if you don't file a ballot.

MS. HARDING: But, Your Honor, if you're gonna -- if Your Honor is going to set that bar date for a ballot, then the Court has to recognize the quandary that is basically in effect in the process that's been set up. For the Court --

THE COURT: No, I don't see a quandary. Every other case that I've been involved in was -- except U.S. Minerals, has not had a bar date and the cases have gone through consensual confirmations. This is the only case in which the parties are this contentious and it's largely because the Debtor is taking the track where it wants to litigate everything. Okay. Litigate everything. If you want to litigate all of the claims, tell me that, and I will set a bar

date, and then I expect to see objections to claims, and that's what we're going to litigate. And then we don't need an estimation process for the current.

MS. HARDING: Your Honor, with all due respect, I think and one thing that's important to recognize is that this bankruptcy occurs in a very different timeframe, in a very different than many other bankruptcies.

THE COURT: No. I'm sorry. But no, it doesn't.

MS. HARDING: Well, there's -- I didn't want to get to that issue, Your Honor, but Miss Baer suggested maybe I should, Your Honor. Under the Debtor's current Plan, which is what we are estimating under, these claimants don't get to vote. That is what the Plan says.

THE COURT: We haven't adjudicated that issue yet, but, quite frankly, if you're going to unimpair them, you don't need to estimate them. All you need to do is say, "Fine, here's the Trust. We'll commit all of our assets for the rest of our existence to paying these estimated claims," and they'll go out either into the tort system or the District Court system, and you'll litigate whatever you need to. You know, as long as you're going to give a pot plan, how are you going to convince me that it is feasible that you've got 100 percent that can fund every claim, both current and estimated? It's only an estimate. Whatever I do by way of setting up the numbers that go into this Trust by way of the Debtor's Plan

that says it's going to pay 100 percent of its allowed claims, is only an estimate. And if I'm wrong, you still have to pay 100 percent of the claims.

MS. HARDING: Your Honor, I'd like -- I really would like to just back up in terms of what we're asking for and what the -- who has the burden here and why it should issue. And I do --

THE COURT: I understand who has the burden. I understand why a bar date could issue and why the presumption is in favor of a bar date. I don't, for the life of me, understand how it's going to advance this case, getting off stuck.

MS. HARDING: Okay.

THE COURT: This case is so stuck that I am really concerned about keeping it in its current posture. I've expressed this for over a year and I don't see progress being made.

MS. HARDING: But, Your Honor, that's precisely why we moved for this now. We're actually on a very fast track --

THE COURT: I'm telling you. If you want --

MS. HARDING: -- and we're making progress.

THE COURT: -- a bar date, I will give you a bar date, but you have to understand, unless you file an objection to every single one of those claims, they're going to be allowed and the Debtor will have to provide 100 percent of their

payment because that's what your Plan says. If you want the bar date, you take both the responsibility and the duties that are imposed in that bar date. So you figure it out. If you want to object to every single claim that may be filed, I will permit you to do that. Otherwise, there is not point to a bar date. You don't need it for aggregate estimation purposes.

MS. HARDING: Your Honor, two things. One, we have been, I believe, perfectly willing for the entire process that this case has been in bankruptcy to litigate these claims, to try to find common issues, and litigate the personal injury asbestos claims, and we are perfectly kind of ready, able, and willing to do that. But the Court has issued estimation, and that we are living with estimation, and we're trying to work with an estimation, but we do --

THE COURT: Wait, wait, wait. The Debtor asked for estimation hearings. I didn't set up estimation as some vehicle by which this has to go forward. The Debtor wants to estimate the aggregate because you have to estimate for future purposes, even if you object to every allowed claim. That's not going to get you the means all and end all for what you have to fund in the Plan --

MS. HARDING: But --

THE COURT: -- for the future.

MS. HARDING: That's right, Your Honor, but we did ask -- in January we did ask for a bar date for all claims and

so --

THE COURT: You did.

MS. HARDING: -- we didn't get that.

THE COURT: But you don't want to take the objection process that is incumbent upon you in the event that a Proof of Claim is filed. A Proof of Claim by operation of law is prima facie evidence of the claim and it governs, unless and until somebody interposes an objection and is successful. Do you really want to do that?

MS. HARDING: Your Honor, it's my understanding that the adjudication of the claims would take place in the Trust and that the process here is for estimation.

THE COURT: Not -- no. If I have a Proof of Claim bar date, that means you're asking me to invoke personal jurisdiction over the claimant. That's what you stood up here several hours ago and argued. If you want me to invoke personal jurisdiction over the claimant, I'll do it, but you're going to be litigating here and I'm telling you, all of us will be retired before you'll be done. Now, is that really what you want to do? I don't think so. I really don't think so.

MS. HARDING: Your Honor, I believe that our position continues to be that we don't -- that we think that the bar date has other purposes than just that and that they don't have to be -- you don't have to get to the allowance process in order to do a proper estimation.

THE COURT: Well --

MS. HARDING: Can I just --

THE COURT: -- I understand that you -- that it does have other purposes, but the issue that you argued to me primarily, both in the papers and here is that you want an assertion of this Court's jurisdiction over the claimant and the reason you want the bar date is so that the Court can exercise jurisdiction. I'm not going to exercise it in part. I'm either going to do it or I'm not going to do it. That's my prerogative with respect to jurisdiction and that's how I deem my obligation. If you have me invoke it, then you're going to have to live with the outcome. And that means potentially litigating 100,000 or I don't know how many, 100,000 claims. Now, that isn't what you want to do and that's not the reason you want the bar date. You want the bar date, I believe, without -- and I'm not casting aspersions, to put some teeth behind the questionnaire. Well, maybe there are no teeth behind the questionnaire.

MS. HARDING: Well, Your Honor, then we have gone through an entire process of sending a hundred and some thousand --

THE COURT: I understand.

MS. HARDING: -- questionnaires out and --

THE COURT: But that's what everybody argued against you and you want to do it anyway --

MS. HARDING: Well -- no --

THE COURT: -- so fine.

MS. HARDING: The -- Your Honor, with all due respect, Your Honor, this issue was raised at each hearing and the Court did not say, "Oh, you don't have jurisdiction." The Court clearly indicated that the Court thought it could have teeth.

THE COURT: I think the Court Order can have teeth because it's got -- it's going out to attorneys and I required under some circumstances that people comply with it. I think the Order does have some teeth, but your argument has been that it doesn't have teeth, unless I assert jurisdiction over the claimant. That's what you've been arguing to me.

MS. HARDING: Actually, Your Honor, that's not -- that's actually the Objectors' argument, but, frankly, if we could show -- excuse me, Mr. -- could you put on the 2019 Statement?

THE COURT: The slide?

MS. HARDING: You have to hit slide show.

(Pause in proceedings)

MS. HARDING: Your Honor, these are the 2019 Statements that are filed. This is just an example. Is it coming up? Try again. It'll come on. Give it a second.

(Pause in Proceedings)

MS. HARDING: Technical difficulties today.

(Pause in proceedings)

MS. HARDING: I'm sorry, Your Honor.

(Pause in Proceedings)

MS. HARDING: Well, Your Honor --

(Pause in proceedings)

MS. HARDING: Slide No. 3, Your Honor.

THE COURT: All right. I have it.

MS. HARDING: Those are the 2019 Statements that are being filed and it almost -- we have -- I haven't looked at every single one of them, but I can tell you that this statement appears on all of them.

THE COURT: Just because they want to say they're not submitting to the Bankruptcy Court jurisdiction or that they're not waiving any right, doesn't mean that they're not submitting to the Bankruptcy Court jurisdiction. People put that in Proofs of Claim all of the time. We're submitting this Proof of Claim, but we're not conceding that we're submitting to Bankruptcy Court jurisdiction. You can't have it both ways, folks.

MS. HARDING: I'm not -- Your Honor, we were going along with the idea that the Court did have the jurisdiction. It was --

THE COURT: Okay. I agree. I think I have it, too.

MS. HARDING: And when we saw that there were so few 2019s being filed, it caused us concern, so we raised the --

THE COURT: Those folks aren't going to get to vote.

Why are you concerned? If they don't file 2019 Statements, your ballot agent isn't going to have a 2019 Statement to compare against the ballots and those firms who submit master ballots aren't going to get to vote. Why are you concerned? You ought to be happy.

MS. HARDING: Because, Your Honor, here -- let me -- if I could go to the board and show the precise problem that Mr. Lockwood is well aware of and not willing to concede the part that's important.

(Presentation away from microphone)

MS. HARDING: We've got a universe of pre-existing claims, Your Honor. All right. That we sent out. (Indiscern.) in our database as people who have pre-Petition personal injury litigation claims --

(Presentation ends)

MS. HARDING: -- against the Trust, Your Honor.

THE COURT: All right.

MS. HARDING: And we know already, according to Mr. Lockwood, that apparently we don't know the whole universe because their briefing says that there are people that didn't get these questionnaires that should have, so --

THE COURT: Okay.

MS. HARDING: -- we've got a slice here of people who we don't -- who are not identified. All right? And we don't know who they are. Right. Now, we also know we've got -- we

just received a call, we've got another 3,000 claims where somebody wants to no longer pursue them. Right? But there's no mechanism for allowing them to withdraw them in this case because they're not, quite frankly, before the Court and so we have this other group of claims.

THE COURT: Then they won't vote.

MS. HARDING: But, Your Honor, before we get to the vote issue, the issue is with respect to the estimation, and how the estimation gets done, and the data that the experts rely on. And I understand that their experts may not want to rely on this data, but our experts do want to rely on this data.

THE COURT: Well, look, with respect to the 3,000 whatever they are, I'll just call them claims, that somebody wants to withdraw, you know, you tell the experts that they've been withdrawn and they take them out of the pool. That's an easy one.

MS. HARDING: That is an easier one, but, Your Honor, the bigger one and the bigger problem is this next group of people who don't return the questionnaire, and who sit in the background, and don't assert -- don't come forward, and let the Court or the Debtors know whether they intend to pursue their claim against Grace. And they have what we believe to be unsupportable claims.

THE COURT: But that's a Trust function.

MS. HARDING: Right? Your Honor, but it's important to the estimation, Your Honor. It's very important whether those people are considered by the experts to be people that are like other people with valid claims or whether they're not. Whether, which is probably the better presumption, is that they didn't have the information to support the claim, which is why they didn't answer the questionnaire.

THE COURT: Okay. Wait. For the past 30 years, roughly, 20 to 30 years the Debtor has been litigating, settling, handling, let me just use that word, handling asbestos personal injury claims. You mean that your experts are not going to look at that universe of claims in this case or any other case and as a matter of comparison, extrapolate from the data that's already available? There are a -- I hate to use this word again, but a gazillion published studies on, you know, estimation issues, and how many people exposed to certain types of estimation contract mesothelioma, and how many contract lung diseases, and how many contract other diseases. Is there a suggestion that that data is all invalid and that your experts are going to do something totally different in this case?

MS. HARDING: Your Honor, from the beginning I think we've made it very clear that -- and the Court has agreed that the best -- I mean, I have the quote here. The Court has agreed that the best evidence of the Debtors' liability for its

current pool of claimants is the current claims.

THE COURT: I agree.

MS. HARDING: And so what is -- why would we -- why when we can set up a very easy process to identify those claimants --

THE COURT: Because you --

MS. HARDING: -- would we guess?

THE COURT: -- because you have half a loaf. You don't want to do the burdens that go along with what you're asking the Creditors to do. The Creditors have a significant burden in filing a Proof of Claim and they have the right to know that if they submit to the Court's jurisdiction, and file that Proof of Claim, so that they can get a distribution against the estate, then their claim's going to be allowed, unless a valid objection to is formed, argued, and sustained. So you can't have it both ways. I'm not going to permit a half a loaf. I don't think it's proper. If you want to argue the Code parameters to me; that a Proof of Claim is generally the way to go, then so are objections to claims. So what's the purpose to doing this for an estimation procedure? You can figure out the allowance of every single Proof of Claim that's filed.

MS. HARDING: Your Honor, may I --

(Presentation away from microphone)

MS. HARDING: I just want to show the Court

(indiscern.) --

(Presentation ends)

MS. HARDING: These are all of the reasons why we think a Proof of Claim with respect to these pre-Petition litigation claimants is appropriate in this case. Now, in Babcock & Wilcox and in Eagle Pitcher they didn't -- they ended up at a consensual Plan, but they had a POC and they were doing estimation, so I don't think it's out of the realm of possibility to have a POC here and to go down this process. Now, those -- there are six legitimate reasons why it makes sense to have a Proof of Claim with respect to these claimants in this case and, Your Honor, I cannot -- actually, if I take a break, I will consult with my client. I mean, I think we are willing to make objections to those claims and to pursue it that way as well, and to be bound to do that as well. But -- these -- the Objectors have not addressed --

THE COURT: Have the --

MS. HARDING: -- why that is -- why those are not appropriate reasons.

THE COURT: The -- this case is getting to the point where it's so penny wise and pound foolish, it's really distressing. You're going to spend all of this money to get Proofs of Claims filed and then say that you're going to litigate them on a claim by claim basis. The whole purpose for 524, which you're invoking in your Plan, is to set up a Trust

so that this issue doesn't create all of the Debtors' funds going to pay legal fees and experts, but, in fact, gets to the injured who need the money.

MS. HARDING: But, Your Honor, our position from the beginning of this case, and I think it's been very, very clear through all of the pleadings, is we don't believe that these claims, many of them, should be paid. And that the company does have equity, if the Court will look, and only consider evidence permissible in Federal Court. And that -- I mean, that is what we've been trying to do all along, whether it's through estimation or through a claims allowance/disallowance process.

THE COURT: Look, the Trust procedures, to the extent that there is some settlement method that is established, will have its own mechanisms for dealing with the claims. In terms of the estimation, I don't know what evidence it is at this point that you expect me to look at or not to look at. We're not that far along in the matter. I would expect that I'm going to admit evidence that's applicable under the Federal Rules of Evidence. That's my standard, but I'm not certain, in the instance that you're asking me to project claims, I'm just not certain. I don't have a ruling on it. I'm just not certain, so don't anybody say to me I said X, when I'm telling you now I'm not certain. I'm not certain that the settlement history isn't relevant to a process, which is going to involve

settlements.

MS. HARDING: I understand, Your Honor, but I'm going to go back to the Court's point about the allowance of claims. This -- the -- a Proof of Claim was permitted in those cases and those cases clearly anticipated and were in the process of estimation, so that should not be a bar to issuing the bar date here. And I --

THE COURT: I don't know what those Courts did, Miss Harding. If somehow or other they let the Debtors bifurcate the loaf, in fact, I think they were in error. If you want to file a -- Proofs of Claims filed, your first line on this chart is established jurisdiction over claimant. You want me to establish that jurisdiction, fine. I'll establish that jurisdiction, but that means they will have allowed claims to the extent that they are filed, unless the Debtor files objections and it gets an objection to that claim sustained. That's what the Proof of Claim process does. Now, why do you want do you want to march down that road?

MS. HARDING: Your Honor, the point of getting a Proof of Claim was to get jurisdiction, so that the claimants are required -- or that the Court has some authority to issue some sanctions, which is not a bar. Which actually the Court has already ruled that the Court is not gonna bar claims because people don't return the questionnaire.

THE COURT: That's right.

MS. HARDING: The Court said that it would -- that there would be some sanction available to it under the rules and right now, according to the Objectors, the Court doesn't have that jurisdiction and I raised --

THE COURT: Why are you worried about sanctions when you don't even have the questionnaires back yet? I mean, I don't understand this. Why are we trying to penalize people for not responding to something when the questionnaires aren't even all distributed yet?

MS. HARDING: But Your Honor, maybe that gets to the heart of it. We are not trying to penalize people. And I think that's actually -- that's something that's been a red herring here. I just want to show the Court -- I mean --

THE COURT: (Indiscern.).

MS. HARDING: I will I'll go back up (indiscern.). I mean, what are they being asked to do here? All right, they're already -- the Court has ordered that they must return this questionnaire. And this a one page Proof of Claim. And if you look at the last slide, Your Honor, we actually pared it down to a post card that could be returned. The Debtors are willing to issue some other kind of notice other than just serving it. We're willing to do some kind of publication as well. I just don't see what is so burdensome about doing that when it would clearly have a legitimate purpose?

THE COURT: Mr. Lockwood's argument that you're not

even getting the entire universe of claims by this one post card form, the last page of your slides, is correct. What it says is, "Name of Creditor, name and address where notices should be sent, title and number of case, Court where complaint was filed, and name and address of your legal counsel." That's it. That's exactly what the 2019 Statement should be doing. And to the extent that there's no 2019 Statement, there isn't going to be a ballot.

MS. HARDING: Your Honor, but the ballot will occur well after the estimation, and it will serve as no useful purpose with respect to getting information on the questionnaires --

THE COURT: And this postcard will?

MS. HARDING: Your Honor, if that goes out with notice about who is supposed to fill it out, only pre-petition litigation claimants who had a pending case against Grace at the time --

THE COURT: And the Debtor doesn't already know that it's been sued, and who the claimants were, and where it was sued?

MS. HARDING: Your Honor, we believe we -- we believe that we know, we believe we have a very good idea. We're told by the objectors that we don't have the complete database, but more importantly, we don't know which of those claimants intend to pursue their claim at this time. That's the important part.

THE COURT: You can make the assumption that if you were sued in State Court and the claim is not resolved that they intend to file a claim against the estate.

MS. HARDING: But Your Honor --

THE COURT: You can make that assumption. That has happened in every other case.

MS. HARDING: That is an assumption that is -- that completely biases the estimate, Your Honor. That's exactly what we're trying to avoid.

THE COURT: Ms. Harding, it's happened. Take a look at the other cases. Not only do people who have currently filed causes of action pending in State and Federal Courts against the Debtor file claims, but a whole host of other entities file claims. You don't eliminate the database by filing a post card that says where was your State Court cause of action filed against the Debtor. That doesn't even get to the tip of the iceberg.

MS. HARDING: Your Honor, but this is a -- this is now -- I beg the Court to kind of think of this issue right now in the context of this timeframe. This is not the same. There are claimants who will not be pursuing their claims because of what is happening with respect to grand jury proceedings, what is happening with respect to medical evidence, what's happened in Manville, what's happened recently in another trust. We've already gotten word from at least one law firm that they don't

intend to pursue their claims, and we've seen what's happened in the PD.

THE COURT: Then I have a suggestion for you. If this is going to be a hundred percent Plan, let's send an announcement out to the world, in fact the Plan, that says, "It's going to be a hundred percent Plan, are you going to fie your claim?" You'll find out what the claims are and then you'll know what the Trust has to be. You know, you're trying to eliminate a universe of claims before the appropriate time to file those claims is. And I understand why you're trying to do it, to preserve equity. Frankly, I don't see how equity's in the money in this case. I don't see it. I don't see it from Debtor's operations, I don't see it from the litigation strategies in the case. I don't see it from the fact that the Plan's been on the table since January and you're not even close to getting consensus. This case is stuck. And it's really distressing. I don't see how the Proof of Claim is going to advance that. It's just going to create more fractionalization.

MS. HARDING: Your Honor, the very -- the reason that Mr. Bernick brought it up in September, the concern that we had was really very limited. We thought we had in place a structure by which the claimants would be required and have some incentive to return the questionnaire. And in essence, that's all we're really looking for here is some kind of

incentive from the Court that will tell the claimants or suggest to them that if they are going to pursue their claim against Grace at some point, they better turn in the questionnaire.

THE COURT: Weren't they given the advice -- pardon me, I do have a lot of cases and it is late, so if I'm misstating this, please correct me. Were those entities who got the questionnaire not told that if they fill out the questionnaire, they'll be the first into the distribution que for the Trust? What more incentive do they need?

MS. HARDING: Your Honor, it's the incentive for the people that don't have strong claims that we're looking for. It's the incentive for the people that have the least supportable claims, which is the group of people that we're most, and I think legitimately, worried about. And --

THE COURT: But Ms. Harding, the information that you want from them is, "Your name, your counsel's name, and where did you sue me." That doesn't tell you what type of claim you have, and you already have this information in your database as to where you were sued.

MS. HARDING: No, Your Honor, all that does is tell us who's going to elect to pursue their claim that they filed. And then we have the questionnaire information, the experts will be able to determine the universe of claims that intend to move forward. And they can assume that they others that didn't

don=t have the information to support their claim, which is really the part that we're really most concerned about. We want -- the experts need something to rely on so that they can make the assumption that if somebody doesn't return the questionnaire, it's because they didn't have the information to support it.

THE COURT: They're not going to be able to make that assumption. They were never able to make that assumption. And they're not going to be able to make that assumption now. If they do make it, their information is going to be biased and it will be unusable. And this Proof of Claim form, which simply says, "Tell us where you sued us," isn't going to get you any more information in terms of the estimation than you already have because people could file this claim form and still not pursue a claim against the Trust.

MS. HARDING: Well, Your Honor, given what you just said, what incentive does anybody have to return the questionnaire then?

THE COURT: The fact that they get into the que first. They think they have a legitimate claim, they don't want to wait forever to get paid from the Trust, and the incentive is that, you know, there may be 100,000 people out there who will have to be compensated in some manner through the Trust, so the 70,000 who return the questionnaires will be in the que first.

MS. HARDING: And so all that does, Your Honor, is

ensure that the people with the strongest claims that Grace intends to pay order the questionnaire --

THE COURT: You know what then, if this is that much of an issue, then I suggest that the Debtor go about formal discovery and forget the questionnaire. I mean, this was intended to help the process, not impede the process. And now you're arguing backwards to me that instead of the questionnaire advocating -- or advancing the cause, it's impeding the cause because there's no hook to it. Well, if there's no hook to it, then withdraw it and let's move on.

MS. HARDING: Your Honor, that's not -- that's -- I think that's -- I mean, that would completely take away everything we've done over the last 9 months to try to put this structure in place, and I think that it's -- it's not just the Debtors that were under the impression that there was some meat and taste to the questionnaire, I think that the Court was under that impression too --

THE COURT: And I --

MS. HARDING: -- and I read that --

THE COURT: -- still am of that impression. I don't have any Motions for Sanctions. I don't know that people aren't going to return the questionnaire. You're making a grand assumption that because you issued 50,000 -- in hypothetical numbers, 50,000 questionnaires that only 1% of them are going to be returned. I mean, you know, that's not

necessarily the case.

MS. HARDING: Well, Your Honor, will you at least reserve open the issue that if when the questionnaires do come due that if it does appear that there are a large number of claimants that are not responding to the questionnaire or leaving most of it blank that the Court will at least entertain the idea of having some kind of Proof of Claim or doing something to try to get those claimants to respond to the questionnaire.

THE COURT: I definitely will leave open the issue of trying to get people to respond appropriately to the questionnaire. And I will keep open the issue of the Proof of Claim form in that connection, but I don't see the necessity, at this stage still, for a Proof of Claim form, especially the one the Debtor's asking for because you've already got that information. And I think you can assume that if somebody took the time to sue you in a State Court and have been stayed from pursuing that litigation because of the bankruptcy, that in all probability they intend to pursue it post-confirmation.

MS. HARDING: Your Honor, one other thought was Mr. Bernick raised the issue of possibly amending the 2019 Statement to require attorneys to file the 2019's earlier than what's required now in the order.

THE COURT: Well, that, you know, may be something -- if people intend to file claims I think they're going to have

to file the 2019 Statement because I've already said if they don't they're not going to vote.

MS. HARDING: So could we amend the 2019 Statement to say, "If you intend to file a claim -- if you have a claim -- you represent a claimant that is a pre-petition litigation claimant and you intend to pursue that claim against Grace, you have to file a 2019 by, you know, February," or something like that?

THE COURT: Well, assuming that --

MS. BAER: Your Honor, this is not on the agenda. If you're going to argue Rule 2019, I'd like an opportunity --

THE COURT: Well, it's not on the agenda, but I want to have a caveat to anything that's said with respect to 2019, not everybody who represents a claimant may have an obligation to file a 2019 Statement. You know, there may be attorneys who have only one client, and they're not required to file those statements. Those people can vote. I'm talking about people who are required to file those statements who will have problems with their -- with submitting ballots and having them counted if they haven't filed a 2019 Statement.

MS. HARDING: Okay, Your Honor, and those are the law firms that represent the large groups of claims, and those are the ones that we're most interested in at least having that. So we will file a motion to at least amend the 2019 Order to require that sooner. Thank you, Your Honor.

THE COURT: This Proof of Claim issue at this point -- when are the questionnaires due back?

MS. HARDING: January 12th, Your Honor.

THE COURT: All right, put this issue back on the agenda. When will you know, in aggregate numbers, you know, like percentages of people who have applied? Will it be for the January hearing or the February hearing?

MS. HARDING: Yes, we'll probably know by then, Your Honor.

THE COURT: All right, then put this issue of the Proof of Claim form back on the January 30th agenda.

MS. HARDING: Thank you, Your Honor.

MR. LOCKWOOD: Your Honor, I just want -- on this Rule 2019, I mean, obviously they can make whatever motion they want to on that subject --

THE COURT: Yes.

MR. LOCKWOOD: -- but essentially what they're going to be doing is they're going to be saying somebody who -- lawyer who has not entered an appearance in the case but who, the way Ms. Harding put it, intends at some point in the future to file a ballot or file a claim that that lawyer should, because of their intention in the future, be required to file a 2019 now. And what the Rule talks about is representing somebody in the case, not intending to represent somebody in the case at a later date. But we can address that on the

papers when they make the motion.

THE COURT: Yes, I think that's -- we'll defer that issue until later. Mr. Monaco?

MR. MONACO: Good evening, Your Honor, for the record, Frank Monaco for the State of Monaco and Her Majesty the Queen and Right of Canada. I represent Canada -- a very diverse client base, Your Honor.

(Laughter)

MR. MONACO: Your Honor, I know the hour's --

THE COURT: Would Her Royal Highness like to file a Proof of Claim --

(Laughter)

MR. MONACO: Well, that's why I came up to address that issue, Your Honor. I know the hour's late and it's very warm in here and I will be brief. Your Honor, both of my clients have contribution indemnification claims stemming from lawsuits that were filed against both Montana and Canada. And most of these lawsuits are post-petition lawsuits. In the case of Montana, the Libby claimants filed 107 actions against Montana on the theories that Montana failed to warn these claimants of the asbestos contamination. And in the case of Montana, those are primarily personal injury claims, there are some property damage claim elements. It's sort of the opposite for Canada. They are primarily post -- they are primarily property damage claims, again, with a sprinkling of personal

injury claims. All of those lawsuits are class actions, and it is my understanding were filed after the bar date, which was March 31, 2003. So it's a relatively new phenomena.

I was just engaged to represent Canada and it's my understanding that today there is a Injunction Hearing, similar to a Section 105 Hearing, in front of Justice Farley in Toronto. And as Your Honor is probably aware, there is a 105 Injunction Hearing scheduled next month in the case of Montana.

Your Honor, part of the problem with this entire process is that structurally it just doesn=t really deal with my clients' claims, either the Plan as presently proposed or the claims estimation process. And I've had some discussions with Ms. Baer and with Mr. Lockwood, for instance, about the questionnaire. And if you look at the questionnaire, it is totally geared towards people that have asbestos related diseases. But technically, Canada and Montana have to fill out these questionnaires for any pre-petition litigation contribution indemnification claims.

Now, I've discuss this problem with both the Debtor and Mr. Lockwood. And everyone is agreement that it just doesn=t make any sense to fill these questionnaires out. It doesn't advance the process whatsoever. And I just wanted some kind of affirmative acknowledgment from both counsel that we don't have to fill it out, that we won't be prejudiced if we don't because it is presently -- I think if you look at the definition of

that kind of claim, it does include a contribution indemnification claim, but I think it just doesn't advance the ball and just causes us extra expense. I wanted to bring this to the Court's attention.

And it's pretty much the same thing with the bar date and filling out a Proof of Claim. Again, I don't think it's really geared, but it's -- towards that, but it sounds like Your Honor has just deferred this issue so we don't have to deal with it. But I wanted to make sure for the record that we do not have to file -- fill out one of these questionnaire forms, given the type of claim that we have, and get acknowledgment of the Court and both parties to that.

And just one final note, Your Honor, on a more positive note. I think we need to sit down with the Debtor and try to hammer out a mechanism to resolve these claims because they're complicated enough, and then you have this bankruptcy overlay that makes it even more complicated. And it's not something that I think is going to be necessarily resolved with a lot of litigation. I think we just need to sit down and work through a mechanism to get these claims resolved so that my client isn't -- clients aren't prejudiced by all this.

THE COURT: Okay --

MR. MONACO: Thank you.

THE COURT: -- Ms. Baer?

MS. BAER: Your Honor, first of all, a reminder that

the questionnaire process is only geared toward pending pre-petition litigation claims that were pending against Grace at the time we filed Chapter 11. It does not apply to Canada whatsoever. It does not apply to all of the new Montana actions that have been commenced against Montana post-confirm -- post-petition. The only exception would be, as I understand it, at the time we filed the Plan and Disclosure Statement, at the time we filed Chapter 11, there was one pending case in Montana. That was dealt with separately in the Plan and Disclosure Statement and would not, again, require Mr. Monaco to file a questionnaire. So at the present time, I don't think that the questionnaire process applies to Mr. Monaco vis-a-vis Canada or Montana. And even if it did, we are not requiring Mr. Monaco's clients to file questionnaires at this time. It will and can be relevant toward estimation. We will talk to him about that, the contribution and indemnification claims do create some interesting challenges that we're going to have to figure out what to do with.

THE COURT: Okay. Mr. Lockwood?

MR. LOCKWOOD: Well, I don't really see that the Committee has a role in saying who should fill out the questionnaire or who should not, but it certainly doesn't have any objection to Ms. Baer's -- what she told Mr. Monaco.

THE COURT: All right. Mr. Monaco, neither Montana nor Canada need to fill out the questionnaire at this time.

MR. MONACO: Thank you.

THE COURT: And if anybody's position on that matter changes, they are required to give you advance notice in accordance with the published schedule for hearings so that you can take some position. They'll have to raise a motion so that you can defend against it.

MR. MONACO: Thank you, Your Honor.

THE COURT: Okay. Ms. Baer?

MS. BAER: Your Honor, with that, we finally get to items numbers 9 and 10 on the agenda, which relate to the Debtors' adversary complaint filed against the State of New Jersey with respect to some -- a civil action in New Jersey and the corresponding motion under Section 362 and 105 to enjoin that action. Your Honor, the hour is very late. The State of New Jersey has been here all day very patiently. I am happy to go forward on the merits of this matter. We had talked about continuing it until December, but frankly, the December hearing, being in Pittsburgh, is not particularly convenient. So unless Your Honor just can't go on --

THE COURT: Oh, no --

MS. BAER: -- we're happy to go forward.

THE COURT: -- I said we were going to finish the agenda, we'll finish the agenda.

MS. BAER: Thank you, Your Honor. Your Honor, the Debtor's Motion to Enjoin the New Jersey Civil Action is to

enjoin an action that was brought in 2005 by the State of New Jersey having to do with a 1995 report filed by the Debtor related to vermiculite operations at a Hamilton, New Jersey site. It was a site that's not owned by the Debtor, it was leased by the Debtor for some period of time. They've been out of that facility for 10 years.

New Jersey is seeking a fine, $75,000 per day for every day that Grace did not correct this alleged false report. All they're seeking is a fine, Your Honor. This does not have to do with clean-up. There was some clean-up going on on that leased property that's subject to the EPA's supervision. It's not a cost recovery case. New Jersey's not seeking any money to pay for a clean-up or anything else vis-a-vis the public health and safety; they're just seeking a fine.

Your Honor, Grace seeks to enjoin this action, and ultimately we will seek to have this Court adjudicate the nature of this fine, the amount of this fine. There is a pending Motion to Transfer Venue in the New Jersey District Court. Grace removed the action to the New Jersey District Court. The State of New Jersey has sought to remand the action back to the State of New Jersey State Court. The State of New Jersey District Court has not ruled. It is pending, it is unclear right now when now when they=re going to rule on transfer of venue. Frankly, we've suggested that they should transfer venue here and you decide the remand action. We don't

know what they'll do.

But right now, Your Honor, what we're asking is we're not asking you to stop the District Court in New Jersey from adjudicating the transfer of venue. What we're asking is we're asking for a stay. We believe, Your Honor, that this case is actually stayed under Section 362. This is not a police power action. It's an action for a fine related to a 10-year old report that allegedly had some falsities in it. Grace has not operated there for 10 years, and as I said before, the property's being -- has been cleaned up by the EPA. There's no health or welfare issue involved. In fact, neighboring properties have been sampled by the State; there are no issues on neighboring properties.

What's happening here, Your Honor, is the State of New Jersey is sort of taking advantage of the fact that they are a State entity in trying to go froward to collect a fine against the Debtors in the State Court rather than coming to this Court. They're essentially saying it's a police power action when it really is not a police power action. And Your Honor, many of the issues that would be adjudicated in that action will actually be dealt with by this Court because it has to do with vermiculite, it has to do with whether there's a risk of harm, and issues that will come up in both the PD and the PI claims here in this Court.

Under Section 362(b)(4), governmental entities have a

right to pursue actions if they are for police -- if they are police or regulatory actions. The legislative history indicates that the idea is that the government be able to protect the safety and welfare of its populants and stop things like fraud or environmental hazard and safety risks. But the 3rd Circuit has recognized, Your Honor, clearly that not every regulatory action is a police power action that merits the exception to the automatic stay. The Court must measure the action against the purpose for which it is being brought. Does the proceeding relate to safety and welfare, or does it really relate to the government's interest in the Debtor's funds? Here, Your Honor, clearly that's what's happening. All they want is a fine. They're not seeking clean-up, they're not seeking cost recovery.

Your Honor, the Penterra case very clearly established that if you're seeking clean-up, it's a police power action. The Nickelette case clearly established if you're trying to fix damages for a clean-up, it's a police power action. But the 3rd Circuit has never held anywhere that where the government action is not proportional to any direct or ongoing public hazard, that the action can proceed outside of the Bankruptcy Court. Your Honor, the magnitude of what New Jersey is seeking, $75,000 per day for 10 years, is well in excess of any possible normal type of action. It's a gigantic fine that relates not, again, whatsoever to any environmental hazard and

the like that has been taking place on that property.

Your Honor, under the circumstances, you have to look at exactly what's going on here. Is the police power action -- is it a police power action or is it not? And that's a fact intensive inquiry. Does it relate to the government's pecuniary interest in the Debtor's estate? Is so, no, it's not a police power action. Does it involve a public policy, an interest in it's general welfare? Yes, that's a police power action. Your Honor, the Penterra case, the Nickelette case, the Trarico case, all cases cited by New Jersey, those are 3rd Circuit cases involving clean-ups and cost remediation.

We, Your Honor, direct the Court's attention to the Bach case. That's a 3rd Circuit case that actually does both. It deals with an OSHA violations. To the extent we were talking about remediating violations, future monies needing to be spent, clearly a police power action. But the Court found that to the extent that they were seeking a fine, that was not a police power action, that was stayed by the automatic stay.

The one case that the State of New Jersey has cited that is somewhat similar to this case is the LTV case. But Your Honor, in LTV, it was the Western District of Pennsylvania District Court, it's not controlling here. Furthermore, it ignores the Brach distinction that the 3rd Circuit made between the clean-up action and the penalty action. And also, Your Honor, in that case, it was an existing regulatory action that

was ongoing before the Debtor filed bankruptcy. And one of the big concerns of the Court there was they were concerned that Debtor was filing just for the purpose of stopping this police -- this action. And they were very concerned that they didn't want to send a message that you could stop any kind of an action with respect to environmental clean-up and the like with respect to environmental liabilities by filing a bankruptcy. But here, Your Honor, we've been in bankruptcy for 42 years. New Jersey's known that. Other entities in the State of New Jersey have actually filed Proofs of Claim against the Debtor. But here, the State EPA, instead of filing a claim in the bankruptcy case or filing an adversary proceeding against the Debtor in the bankruptcy case, filed a case in the State Court of New Jersey simply to collect a very large fine.

Your Honor, we do not believe it's a police power action. We do believe under Section 362 it is enjoined and this Court should in fact enforce that injunction. Alternatively, Your Honor, the Court does certainly have the power under 105 to enjoin the action, and doing so would be very similar to many things you've done in this case before, although those were third party actions. This one is unique, this one is actually against the Debtor. And we're seeking to have that action stayed.

In the Penterra case, the 3rd Circuit clearly established that the Court does have the power to enjoin a police power

action under Section 105 in order to assure the orderly conduct of the reorganization process. It is very clear, Your Honor, from that case and other cases of its like that this Court can protect the interest of other Creditors by enjoining a police power action if that police power action would, in fact, weigh against the bankruptcy process and hurt the bankruptcy process. You have the right under 105 to prevent interference with the Chapter 11 process. The Federal interest in bankruptcy outweighs the State's interest in collecting its fine.

In order to make the determination as to whether or not under 105 you should issue the injunction, the regular injunction elements apply, Your Honor, and here they all apply quite clearly. The likelihood of success on the merits, not the merits of whether or not New Jersey would ultimately be able to collect the fine, it's the merits of whether or not enforcing the State law in the State Court will unduly interfere with the bankruptcy process. That's the way in which the Court looks at the likelihood of success on the merits. And Your Honor, here, clearly, it would. The potential size of this penalty, the distraction of time and attention of the Chapter 11 Debtor at a time which is a very time intensive case already here. We are down the road of estimation, we're spending a lot of time. The Debtors employees, the professionals, everybody's spending a tremendous amount of time. To have to divert their attention and defend this action

in New Jersey would hurt the process.

Furthermore, Your Honor, it makes the playing field uneven. While all of the other Creditors of the Chapter 11 Debtor here have to wait and adjudicate their claims as part of this bankruptcy process, the State of New Jersey wants to adjudicate its claim separately in the state of New Jersey, where I'm sure it believes it has the home court advantage. But Your Honor, that's not the way it works. The way it works is if you want to collect against the Debtor, you come here and collect against the Debtor.

Separate -- second element, Your Honor. The Debtors will suffer irreparable harm for the reasons I just said, forcing us to participate in substantial litigation elsewhere, diversion of key personnel and money. And frankly, Your Honor, this Court can more easily and better handle efficiently these issues than the State of New Jersey Court. And Your Honor, we can avoid the possibility of different rulings here and there because again, you will be dealing with some of the very same issues about vermiculite, vermiculite harm, and its effect on claims.

The third element, Your Honor, Defendant's risk of harm. There's essentially none here. The State of New Jersey has waited years to file this action. The alleged false report is 10 years old. And again, they're just looking for a fine. That's all they're looking for. There's no remediation,

there's no cost recovery.

And fourth, Your Honor, we have the public interest. Here there's a strong bankruptcy policy that everybody be put on an even playing field. By permitting New Jersey to go forward with this action in the State will change that process, that's exactly why 362 exists, it's exactly why 105 exists. There's a public interest in honoring those provisions and staying this action.

Your Honor, there's one other thing that's going on here, and that is in addition to Grace, two individuals have been sued. One of the individuals in an officer of Grace and the other individual is a former employee. Your Honor has the jurisdiction to also enjoin those actions. In fact, you already have. The injunction that you issued on day one of this case enjoined third party claims against officers, directors and employees of Grace. The same exact behavior is involved here. The same -- they're asking employees and officers to defend themselves in exactly the same claims that they're making against Grace. They're indistinguishable from the claims against Grace, and yes, Grace's bylaws provide for indemnification of these officers and directors and employees, both for the behavior as well as attorney's fees. Under the very same case law that permitted you to issue the injunction in the Shakarian adversary proceeding where we have it, it would apply here. And again, this is belts and suspenders; we

probably already have the injunction in the other injunction. But to the extent we don't, Your Honor, for the very same reasons you issued that injunction, we would ask that the injunction here also relate to the directors, officers and employees who are in exactly the same position as Grace.

Your Honor, under these circumstances, again, we believe this is not a police power action, and under Section 362 it's already enjoined and Your Honor should simply enforce that injunction. Alternatively, we would ask that Your Honor issue a stay under Section 105 enjoining the State action from going froward. Again, we're not asking you to deal with the transfer of venue and stop that from going forward. The District Court in New Jersey can decide that. But it's the merits of the case we do not believe should be going forward.

THE COURT: All right. Thank you. Good evening.

MR. DEVINE: Good evening, Your Honor. Edward Devine, Deputy Attorney General for the Defendants in this action, Mr. Harvey and Mr. Campbell. The Debtor went through a whole line of cases for the Court from the 3rd Circuit. What the Debtor failed to clarify, however, is that when the Court prevented the state government entity from going forward with a penalty, that was because they were trying to enforce that penalty. In Bach, for example, the Court states clearly that the government agency is not before it to fix a penalty, it's here to collect.

The State of New Jersey is not, in it's State Court

action, seeking to collect money, it is seeking to fix the amount of the penalty. Legislative history of Section 362(b)(4) states that the governmental unit suing a Debtor to prevent fraud, environmental protection safety, or attempting to fix damages for violation of such a law. That's why the State commenced this action in State Court.

THE COURT: But this isn't a penalty provision seeking to fix damages, it's just a fine. And the fine, as I understand it, at $75,000 a day for 10 years can't be, at this point in time, related to the actual cost of clean-up, so you're not asking that the damage be fixed, you're asking to impose a fine.

MR. DEVINE: First of all, the statute says up to 75,000, if you read it carefully.

THE COURT: Okay.

MR. DEVINE: The Jersey Court will have the discussion to set that fine wherever it chooses.

THE COURT: Okay, but regardless of where the Court decides to fix the fine, the fine is not the damage, it's simply a penalty.

MR. DEVINE: That's correct.

THE COURT: Okay. So I'm not sure how that's not stayed by 362.

MR. DEVINE: Because part of the police and regulatory power of the DEP is to assign penalties. In this case, a very

important document -- in fact, one of the other counsel mentioned ISRA. When you shut down a business, you have to go through a very complicated process to ensure that it's clean. And it was that form stating there was no contamination on the site that these two individual Defendants signed off on and which later proved to be false. Now, in 1995 when they signed it, we had no knowledge that it was incorrect. It was only years later when the EPA began a clean-up that we found out that the vermiculite contamination was all throughout the site. So that fine, as I said, if and when it's applied, this state government agency is not intending to collect from Grace, therefore, it's not going to disrupt this bankruptcy proceeding.

THE COURT: Well, I think it is going to disrupt the bankruptcy if its officers and directors and have to defend a 75 million times 365 or 366 per day for 10 years fine allegation. That's definitely going to cause some disruption, not just to the officers and the directors, but to every other process in this case. That's probably larger than the Libby Plaintiffs' claim in the case.

MR. DEVINE: But as I said, Your Honor, there's no knowledge at this moment that anything near that amount would be imposed.

THE COURT: But the Debtor has to defend against it, that's the problem. The Debtor has to undertake a defense. If

you're saying "up to," what is the fine that's being sought? If it's a dollar a day for 10 years, then maybe the litigation isn't going to cause that kind of disruption to the estate. The Debtor might even concede a dollar a day for 10 years. But if it's $75,000 a day, that's going to cause some disruption and the Debtor has to defend against it. So if the pleading says "up to," but there is no limitation on the "up to," then the Debtor has to be prepared to defend against $75,000 a day. And that's a significant issue in this case.

MR. DEVINE: When you say "prepare to defend," do you mean the litigation itself?

THE COURT: Well, sure.

MR. DEVINE: Okay --

THE COURT: If you=re saying that you're attempting to fix the claim --

MR. DEVINE: Yes.

THE COURT: -- in the State Court.

MR. DEVINE: That's right.

THE COURT: Okay. And the claim that you're attempting to fix is up to $75,000 per day for the past 10 years.

MR. DEVINE: That's correct.

THE COURT: Okay. That issue is a significant issue in this estate, and there will be a consequence to the extent that a claim is fixed in that amount, especially a penalty

claim which under some circumstances may even be subordinatable in the case. I don't know that it is or isn't, but it's possible that it may be. So not only will the Debtor have to defend against it, but on top of that, the Debtor may not have to pay it. So -- and it's a fine. It's not for damages. So why isn't it stayed by 362?

MR. DEVINE: Well, in the cases that I was just discussing, including Penterra, they speak of the dichotomy between a government and the enforcing a money judgment and fixing a money judgment. So in that case, Penterra, in Nickelette, in Brach, and in James, they all say that, just as the legislative history there mentioned, that the state -- police power allows the state to go into Court and establish or fix an amount --

THE COURT: Well, I think --

MR. DEVINE: -- of the penalties.

THE COURT: -- they're talking -- well, I'm sorry, I'll have to go back and look at the cases. I didn't -- I don't, at the moment, appreciate that they're talking about penalties. I thought they were fixing -- talking about damages.

MR. DEVINE: No, it's penalties, Your Honor, and in fact --

THE COURT: Okay.

MR. DEVINE: -- as I said, in the legislative history

that I started with -- okay. The police power permits the entry, entry, of a money judgment but does not extend to permit enforcement of a money judgement.

THE COURT: Okay.

MR. DEVINE: That's the dichotomy of that. So that's why we're saying that we're within the exception of (b)(4) because we're attempting to fix a penalty.

As to the 105 injunction, the State contends that Grace is not faced with any irreparable harm. The standard that's been established in the 3rd Circuit, again, is that it can't be irreparable if it can be fixed with money. In other words, if you can make it up down the road by recovering monetary damages, then it's not irreparable harm.

THE COURT: Well, I appreciate the legal premise. I can also appreciate the fact that if Grace loses a $75 million claim every day for the last 10 years -- or $75,000 claim every day for the last 10 years that this case is a Chapter 7 and nobody's going to be paid. So there is irreparable harm, not just to the Debtor, but to every other constituency in the case. You folks need to talk.

MR. DEVINE: That could be arranged, Your Honor.

THE COURT: That's what you need to do. Why don't I defer this issue for, I don't know, a month or two. You tell me what's appropriate and let me see if you folks can't talk --

MR. DEVINE: Let's say two, we'd rather not go to

Pittsburgh, no offense.

THE COURT: That's fine.

MR. DEVINE: It's a long ride. Thank you, Your Honor.

MS. BAER: Your Honor, for the record, we're always willing to talk, and I do believe there have been some discussions with New Jersey, although not in terms of the details here. But Your Honor, what we're asking here for is a stay, and we think that that's appropriate, and we're always willing to talk with them. We would certainly hope that they would not be really serious about $75,000 a day, but that's what they've asked for.

THE COURT: Well, I think a stay for a brief period of time while you folks talk is not inappropriate. And I'm willing, if New Jersey also agrees, especially if New Jersey would agree, to keep a stay in place to see if you can't come to some negotiated resolution to this that will not require litigation in any Court with respect to the fine amount.

MR. DEVINE: Your Honor, it's effectively stayed right now. They have the Remand Motion but they haven't acted on it so.

THE COURT: Okay. All right, the hearings in January are on the 30th?

MS. BAER: It's January 30th.

THE COURT: I will accept an order from the Debtor -- this is on items 9 and 10, correct?

MS. BAER: Yes, Your Honor.

THE COURT: That will impose a temporary stay through the conclusion of the January 30 Omnibus so that the parties can meet and confer in an effort to resolve the issues that were discussed today consensually. And then this hearing, if continued to January 30 with the Omnibus, and I'll see where you are, whether you've come up with some negotiated resolution, and if not, whether you want a further stay, and if not, if you want a decision. But I'll hear what you have to stay at that time.

MR. DEVINE: Thank you, Your Honor.

MS. BAER: Thank you, Your Honor.

THE COURT: All right. Okay.

MS. BAER: Your Honor, I'm pleased to say that that concludes the agenda for today.

THE COURT: Well, thank you all for your patience today. I'm sorry about the in and out's for the case, but I just couldn't help it based on the other matters that were going on, so thank you.

MS. BAER: Your Honor, we appreciate that you would stay with us and get this done.

THE COURT: Okay. We'll see you next month.

(Court adjourned)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

_____ _____

Signature of Transcriber Date